No. 15619

United States
Court of Appeals
for the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARY TROUTFELT COHEN, Appellee.

And

MARY TROUTFELT COHEN, Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-20-57

No. 15619

United States
Court of Appeals
for the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARY TROUTFELT COHEN, Appellee.

And

MARY TROUTFELT COHEN, Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

BROBECK, PHLEGER and HARRISON,
MOSES LASKY,
RICHARD HAAS,

111 Sutter Street,
San Francisco, California,

For Mary Troutfelt Cohen.

KEESLING & KEESLING,
WILLIAM H. KEESLING,
Kohl Building,

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,

315 Montgomery Street,
San Francisco, California,

For John Hancock Mutual Life Insurance Company, a corporation.

In the United States District Court, Northern District of California, Southern Division

No. 33864-Civil

MARY TROUTFELT COHEN, Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, Defendant.

EXCERPT FROM DOCKET ENTRIES

1954

July 12—Filed petition on removal with copy of complaint and summons attached.

12—Filed bond on removal in sum of $250.00.

* * * * *

July 27—Filed answer and counterclaim of defendant.

Aug. 11—Filed request of plaintiff for admissions by defendant.

* * * * *

Sept. 30—Filed response of defendant to request for admissions.

* * * * *

Oct. 11—Filed interrogatories by plaintiff to defendant.

* * * * *

Dec. 6—Filed reply of plaintiff to counterclaim of defendant.

* * * * *

1954

Dec. 7—Filed answer of defendant to interrogatories by plaintiff.

1955

Feb. 9—Filed statement of plaintiff of admitted facts.

9—Ordered assigned to Judge Carter for trial this date. (Roche)

9—Court trial. Opening statements made, evidence and exhibit introduced, memos ordered filed 10-10-5 days and case continued to March 11, 1955 for submission. (Carter)

* * * * *

May 14—Filed memo order of Court. Prayer of plaintiff for attorney fees denied and plaintiff to recover balance of $8000.00 due on policy of insurance with interest on all accrued but unpaid payments. Counsel to prepare findings, conclusions and judgment. (Carter)

16—Mailed copies order to counsel.

24—Lodged findings and conclusions of plaintiff.

24—Lodged judgment by plaintiff.

31—Filed proposed modifications of defendant to findings, conclusions and judgment.

June 24—Ordered after hearing on settlement of findings and conclusions, matter submitted. (Carter)

* * * * *

1955

June 29—Filed notice and motion by plaintiff to amend complaint, July 6, 1955.

* * * * *

July 6—Filed order permitting amendment to complaint. (Carter)

6—Filed amended complaint.

* * * * *

Nov. 10—Filed stipulation that answer of defendant be deemed amended to deny allegations of paragraph 13 of complaint and defendant reserves objections to order allowing plaintiff to file amendment.

* * * * *

1957

Mar. 20—Filed findings of fact and conclusions of law. (Carter)

20—Entered judgment—filed March 20, 1957—for plaintiff vs. defendant in sum of $8000.00 plus interest at 7% per annum from date of entry of judgment together with costs. (Carter)

20—Mailed notices.

* * * * *

27—Filed notice of appeal by defendant.

28—Mailed notices.

27—Filed supersedeas bond in sum of $10,000.00, "Approved this 27th day of March, 1957, Oliver J. Carter, United States District Judge."

April 1—Filed appellant's designation of record on appeal.

1957

April 8—Filed notice of appeal by plaintiff.
8—Filed appeal bond in sum $250.00 by plaintiff.
8—Mailed notices.
9—Filed statement of Mary Troutfelt Cohen re designation of record.
19—Filed order extending time to docket appeal to June 24, 1957.
22—Mailed copies order to counsel.

[Title of District Court and Cause.]

PETITION FOR REMOVAL

To the Judges of the United States District Court for the Northern District of California, Southern Division:

The petition of John Hancock Mutual Life Insurance Company respectfully shows:

I.

On the 23rd day of June, 1954, an action was commenced against petitioner in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mary Troutfelt Cohen, Plaintiff, vs. John Hancock Mutual Life Insurance Company, Defendant, numbered 439325, by the service upon petitioner of a summons and complaint, copies of which are annexed hereto. No further proceedings have been had therein.

II.

The above described action is one which this

Court has original jurisdiction under the provisions of Title 28, United States Code, §1332, and is one which may be removed to this Court by petitioner, defendant herein, pursuant to the provisions of Title 28, United States Code, §1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and is between citizens of different states.

III.

Petitioner is informed and believes and therefore alleges that plaintiff, Mary Troutfelt Cohen, at the time this action was commenced, was and still is a citizen of the State of New Mexico, and defendant John Hancock Mutual Life Insurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of the State of Massachusetts and was not and is not incorporated under the laws of the State of California.

IV.

Your petitioner herein files and presents herewith a bond with good and sufficient surety in the penal sum of Two Hundred Fifty Dollars ($250.00) conditioned as required by Acts of Congress on that behalf duly made and provided, that petitioner will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that this case is not removable or is improperly removed.

Wherefore, your petitioner prays that this cause

proceed in this Court as an action properly removed thereto.

KEESLING & KEESLING,
/s/ By WILLIAM H. KEESLING,
Attorneys for Petitioner.

Duly Verified.

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 439325

MARY TROUTFELT COHEN, Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Defendant.

COMPLAINT ON LIFE INSURANCE POLICY AND FOR DECLARATORY RELIEF

Plaintiff Mary Troutfelt Cohen complains of defendant John Hancock Mutual Life Insurance Company and alleges:

1. Defendant is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of Massachusetts and is, and at all said times has been, doing business in the State of California, has at all said times possessed and now possesses a valid and unrevoked certificate of authority issued by the Insurance Commissioner of the State of California to transact in the State of California life and disability insur-

ance and, as a condition precedent to admission to transact such business in the State of California, has filed in the office of said Insurance Commissioner a writing designating an agent for service of process in the State of California. The insurance policy hereinafter referred to was written through one of defendant's San Francisco agencies.

2. Martin E. Troutfelt died June 28, 1945. At all times herein mentioned prior thereto he and plaintiff were husband and wife.

3. As of February 24, 1939 Martin E. Troutfelt, as insured, and defendant, as insurer, entered into a written contract of life insurance on the life of said Martin E. Troutfelt, and plaintiff was named as beneficiary thereunder.

4. Said contract was represented and evidenced by defendant's policy No. 3223099, together with supplements attached thereto as a part of it. One of the supplements attached to said policy and contract and constituting a part thereof was and is a "Supplementary Provision for Family Income", a true and correct copy of which is attached hereto as Exhibit 1 and made a part hereof.

5. After the death of the insured, plaintiff delivered custody of said policy to defendant; on or about July 26, 1945, defendant thereupon read said policy and endorsed and executed on it a legend reading as follows:

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.

John Hancock Mutual Life Insurance Company
By [Sig.] Elmer L. French, Secretary
Dated at Boston, Mass., July 26, 1945."

Thereupon defendant returned said policy, so endorsed, to plaintiff.

6. In and by said contract defendant agreed to pay to plaintiff a monthly income of fifty dollars ($50) on the first day of each month following the death of the insured and continuing until and including the first day of February, 1959, if the insured should die prior to that date but after payment of the initial premium, and defendant further agreed to pay to plaintiff the additional sum of five thousand dollars ($5,000) on the expiration of 20 years from February 24, 1939.

7. The insured, Martin E. Troutfelt, in consideration of the above promise by defendant, agreed to pay premiums as provided in said policy until the date of his death, and he did pay all said agreed premiums.

8. The insured duly performed all the conditions on his part agreed to be performed in and by said contract.

9. After the death of the insured defendant paid to plaintiff each month the sum of fifty dollars ($50) to and including February 1, 1954.

10. Since February 1, 1954, defendant has failed and refused and continues to fail and refuse to pay any further monthly sum, and no further sum has been paid.

11. On or about May 13, 1954, defendant notified plaintiff in writing that it "does not consider it is

liable for any further monthly payments under the family income provision, but is only liable for final payment of $4,993.59, which was due and payable on February 24, 1954. Immediately upon receipt of the policy contract, check for this amount will be sent to you''. Thereby defendant positively repudiated the contract and committed an anticipatory breach thereof.

12. An actual controversy exists between plaintiff and defendant. Plaintiff asserts that under said contract defendant is under the legal duty to pay to her, and plaintiff has the legal right to receive from defendant, the family income payments of $50 per month for each and every month to and including February 1, 1959, in addition to the sum of $5,000, and further asserts that in view of said anticipatory breach by defendant, plaintiff has the legal right to receive and defendant is under the legal duty to pay to plaintiff, forthwith, the said entire sum of $8000. The defendant asserts that it is under no duty to make any further payments of family income to the plaintiff and further asserts that its only obligation to plaintiff is to pay the sum of $4,993.59 and then only in the event plaintiff should surrender the policy and relinquish all rights to further payment thereunder.

Wherefore, plaintiff prays judgment against the defendant in the sum of $8000, plus interest at the legal rate until paid on the sum of $50 from March 1, 1954, on the further sum of $50 from April 1, 1954, on the further sum of $50 from May 1, 1954,

and on the further sum of $50 from June 1, 1954, for a declaration of the rights and duties of plaintiff and defendant under said policy and contract of insurance, for her costs of suit herein incurred, and for such other and further relief as may be meet and proper.

BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

Duly Verified.

EXHIBIT 1

Supplementary Provision for Family Income with Benefit for Total and Permanent Disability, Waiver of Premiums.

Issued by the John Hancock Mutual Life Insurance Company as a part of and attached to Policy No. 3223099 on the life of Martin E. Troutfelt.

If, after payment of the initial premium under the policy and this supplementary provision, and before default in the payment of any subsequent premium, the death of the Insured shall occur within 20 years from the date hereof, the Company, upon receipt of due proof on the Company's prescribed forms, of the death of the Insured, will, in lieu of immediate payment of the amount insured in one sum, pay to the beneficiary named in the policy, if living, or to such other beneficiary as may be finally substituted under the conditions of the policy, on the first day of each policy month following the death of the Insured, a monthly in-

Exhibit 1—(Continued)

come which shall consist of interest of $2.46 per month per $1000 of the sum insured plus an annuity certain of $7.54 per $1000 of the face amount of the policy, the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of issue of this provision. Upon the expiration of the said period the Company will pay the amount insured plus any paid up additions or accumulated dividends to the credit of the policy and less any indebtedness under the policy.

Monthly income payments will be increased by $2.46 per $1000 of any paid up additions or dividend accumulations to the credit of the policy and will be decreased by $2.46 per $1000 of any indebtedness under the policy. In addition there will be paid yearly such share of interest earnings in excess of 3% per annum as the Company may from year to year determine.

If at the death of the Insured, the beneficiary is not living, or if the beneficiary shall not live to receive all the monthly income payments, the Company in either such event will pay the proceeds of the policy increased by the commuted value (at 3% per annum) of all monthly annuity certain payments then remaining unpaid, to the executors or administrators of the last survivor of the Insured and beneficiary or beneficiaries.

If at the death of the Insured the policy is payable to an assignee, the Company will pay the proceeds of the policy together with the commuted

Exhibit 1—(Continued)

value (at 3% per annum) of any monthly annuity certain payments required by the terms of this provision.

No beneficiary hereunder shall have the right to assign, change or commute any monthly income payments hereunder, nor shall any monthly income payments be subject to claims of creditors of such beneficiary.

The monthly annuity certain of $7.54 per $1000 of the face amount of the policy is granted in consideration of the statements and representations in the application herefor and of a special annual premium of $43.20.

In consideration of the payment of a further special annual premium of $1.10 the Company will waive the payment of the aforesaid premiums for the monthly annuity certain, if and when premiums under the policy are waived under any Total and Permanent Disability Provision.

The special premium for the annuity certain and the special premium for the Total and Permanent Disability Provision will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issue of this provision.

Upon request of the Insured on any policy anniversary and presentation of the policy and this supplementary provision to the Company this provision and all benefits hereunder will be cancelled.

This supplementary provision is subject to the conditions and provisions of said policy, so far as

Exhibit 1—(Continued)

applicable, and it shall supersede any method of settlement previously elected under said policy.

In Witness Whereof, the John Hancock Mutual Life Insurance Company has, by its President and Secretary, executed and delivered this supplementary provision and caused the same to be duly countersigned, at Boston, Massachusetts, on this Twenty Fourth day of February A.D. 1939.

/s/ Guy W. Cox,
President.
/s/ Charles J. Diman,
Secretary.

Countersigned:

/s/ F. G. Bowen,
Registrar.

[Endorsed]: Filed June 23, 1954.

[Title of Superior Court and Cause.]

SUMMONS

The People of the State of California Send Greeting to:

John Hancock Mutual Life Insurance Company, Defendant.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and

County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated June 23, 1954.

[Seal] MARTIN MONGAN,
Clerk,
By H. J. GUDELJ,
Deputy Clerk.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON REMOVAL

Know All Men by These Presents:

That American Surety Company of New York, a corporation organized and existing under the laws of the State of New York for the purpose of becoming surety on bonds required by law and which has complied with the laws of the State of California, is held and firmly bound unto Mary Troutfelt Cohen in the penal sum of Two Hundred Fifty Dollars ($250.00) lawful money of the United States, for the payment hereof well and truly to be made unto the said Mary Troutfelt Cohen, the

said American Surety Company of New York binds itself, its successors, representatives and assigns firmly by these presents.

The condition of the above obligation is such that, whereas, the John Hancock Mutual Life Insurance Co., a Massachusetts Corporation, the Defendant, is about to file its petition in the United States District Court for the Northern District of California, Southern Division, for the removal of a certain cause pending in the Superior Court of the State of California in and for the City and County of San Francisco, State of California, wherein said Mary Troutfelt Cohen is plaintiff and the said John Hancock Mutual Life Insurance Co., is the defendant, to the United States District Court for the Northern District of California, Southern Division.

Now, therefore, if the said John Hancock Mutual Life Insurance Co., a corporation, shall well and truly pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that said suit was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, said American Surety Company of New York has caused these presents to be signed and its corporate seal to be affixed this 9th day of July, 1954.

[Seal] AMERICAN SURETY COMPANY
OF NEW YORK,

/s/ By L. T. PLATT,
Res. Vice President,

Attest:

/s/ F. E. BUCKINGHAM,
Res. Asst. Secretary.

Bond #35-540-960
Premium $10.00 term

Notary Public's Certification Attached.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Defendant above named answers plaintiff's complaint on file herein as follows:

I.

Answering paragraph 1 thereof defendant admits that at all times herein mentioned it is and has been a corporation organized and existing under the laws of the State of Massachusetts and authorized to transact and is transacting its business in the State of California and the State of New Mexico and has complied with the laws of each of said States therefor. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

II.

Answering paragraph 3 thereof defendant admits that on February 24, 1939 Martin E. Troutfelt and defendant entered into a contract of insurance on the life of said Martin E. Troutfelt, said contract

of insurance naming as beneficiary thereof Mary Troutfelt, wife. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that said policy was numbered 3171136, that pursuant to written application for conversion of said policy of insurance and modification thereof, dated respectively May 31, 1939 and July 11, 1939, defendant in accordance with the provisions of said policy therefor issued and delivered to said insured Martin E. Troutfelt its Policy of Insurance No. 3223099.

III.

Answering paragraph 4 thereof defendant admits that one of the supplements attached to said Policy of Insurance is a "Supplementary Provision For Family Income", a true and correct copy of which said supplementary provision as written and attached to said Policy of Insurance is attached to plaintiff's complaint as Exhibit 1. Defendant further admits that it issued and delivered to said Martin E. Troutfelt its Policy of Insurance No. 3223099. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that through mistake of one of defendant's scriveners the Supplementary Provision attached to and made a part of said Policy of Insurance was not in accordance with the written applications made by said Martin E. Troutfelt to defendant.

Attest:

/s/ F. E. BUCKINGHAM,
Res. Asst. Secretary.

Bond #35-540-960
Premium $10.00 term

Notary Public's Certification Attached.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Defendant above named answers plaintiff's complaint on file herein as follows:

I.

Answering paragraph 1 thereof defendant admits that at all times herein mentioned it is and has been a corporation organized and existing under the laws of the State of Massachusetts and authorized to transact and is transacting its business in the State of California and the State of New Mexico and has complied with the laws of each of said States therefor. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

II.

Answering paragraph 3 thereof defendant admits that on February 24, 1939 Martin E. Troutfelt and defendant entered into a contract of insurance on the life of said Martin E. Troutfelt, said contract

of insurance naming as beneficiary thereof Mary Troutfelt, wife. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that said policy was numbered 3171136, that pursuant to written application for conversion of said policy of insurance and modification thereof, dated respectively May 31, 1939 and July 11, 1939, defendant in accordance with the provisions of said policy therefor issued and delivered to said insured Martin E. Troutfelt its Policy of Insurance No. 3223099.

III.

Answering paragraph 4 thereof defendant admits that one of the supplements attached to said Policy of Insurance is a "Supplementary Provision For Family Income", a true and correct copy of which said supplementary provision as written and attached to said Policy of Insurance is attached to plaintiff's complaint as Exhibit 1. Defendant further admits that it issued and delivered to said Martin E. Troutfelt its Policy of Insurance No. 3223099. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that through mistake of one of defendant's scriveners the Supplementary Provision attached to and made a part of said Policy of Insurance was not in accordance with the written applications made by said Martin E. Troutfelt to defendant.

IV.

Answering paragraph 5 thereof defendant admits that after the death of the insured it endorsed and executed the legend set forth in said paragraph and returned the said Policy of Insurance to Mary Troutfelt. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

V.

Answering paragraph 6 thereof defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant admits that under and pursuant to the written applications of said Martin E. Troutfelt for modification and conversion of said Policy of Insurance No. 3171136, it agreed to pay to Mary Troutfelt the benefits as requested in said applications and for the period therein specified as hereinafter more particularly referred to.

VI.

Answering paragraph 7 thereof defendant admits that said Martin E. Troutfelt paid the premiums for said Policy of Insurance as provided in his application therefor. Save and except as herein specifically admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

VII.

Answering paragraph 8 thereof defendant admits that said insured duly performed all of the

conditions on his part agreed to be performed in and by said application for said Policy of Insurance.

VIII.

Answering paragraph 9 thereof defendant admits that after the death of the insured it paid to said Mary Troutfelt each month the sum of $49.98 to and including February 1, 1954. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

IX.

Answering paragraph 10 thereof defendant admits that since February 1, 1954 it has failed and refused and continues to fail and refuse to pay any further monthly sum under said Policy of Insurance and applications therefor. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that it has tendered to and now stands ready, willing and able to pay to and does hereby offer to pay to plaintiff the sum of $4,993.59, being the full face amount of said Policy of Insurance now due and payable under its terms and provisions and those of the applications therefor.

X.

Answering paragraph 11 thereof defendant denies generally and specifically the second sentence thereof.

XI.

Answering paragraph 12 thereof defendant admits the allegations therein contained save and except the last sentence thereof. In this connection defendant alleges that its position in said controversy is as hereinafter alleged.

As and for a First Affirmative Defense and Counterclaim Defendant Alleges as Follows:

I.

On February 24, 1939, pursuant to written application therefor by Martin E. Troutfelt, defendant issued and delivered its Policy of Insurance No. 3171136 on a 20-Payment Life Plan in the face amount of $5,000.00, said Policy of Insurance having attached thereto and made a part thereof a Supplementary Provision For Family Income Rider providing for the payment of benefits as therein set forth in the event of the death of the insured within twenty years from February 24, 1939, for a period not to exceed twenty years from said date and further providing for the payment of premiums therefor for the first fifteen years of said term in the amount of $52.95 annually.

II.

On or about May 31, 1939 said Martin E. Troutfelt made application to defendant for exchange or conversion of said Policy of Insurance No. 3171136 to a new endowment policy maturing in fifteen years upon his said life, said Policy of Insurance being numbered 3223099 and naming as beneficiary thereof Mary Troutfelt, wife. In con-

nection therewith and on or about July 11, 1939 said Martin Troutfelt made application to defendant for Supplementary Provision For Family Income to be attached to said new Policy of Insurance No. 3223099, said benefits to be paid in accordance with the terms and provisions of said application for not more than fifteen years from February 24, 1939 and for the payment of premiums therefor for a period of ten years in the annual amount of $43.20. Each of said applications was attached to and made a part of and, together with the original application for the old Policy of Insurance No. 3171136 and the Supplementary provisions attached to said Policy of Insurance, constituted the full contract of insurance herein sued upon.

III.

Through mutual mistake of defendant and insured and by accident the Policy issued and delivered by defendant to said Martin E. Troutfelt was not the Policy contracted for by said insured and defendant in that through error of a scrivener in completing the Family Income Supplement to be attached to said new Policy of Insurance No. 3223099, the scrivener inserted as the duration for the payment of the said benefits the figure "20" rather than "15" and the term for the payment of premiums therefor, the figure "15" instead of "10".

IV.

At the time insured contracted with defendant for the converted Policy of Insurance and its supplementary agreements, at the time said Policy of

Insurance and said supplementary agreements were delivered by defendant to the insured and at all times since such delivery the insured, until his death, and the defendant, until on or about the 25th day of March, 1954, by mutual mistake and accident, believed that the Policy of Insurance and its supplementary agreements issued by defendant to the insured were the Policy of Insurance and supplementary agreements contracted for between defendant and the insured and that said issued Policy and supplementary agreements would give to the insured the insurance agreed upon by insured and defendant. In said Policy of Insurance the premium of $43.20 for the 15-Year Plan was listed therein correctly. Said $43.20 was the premium charged and paid during the lifetime of the insured.

V.

Upon the insured's death, June 28, 1945, defendant commenced payment under the Supplementary Provision For Family Income to continue for eight years, seven months, the balance of the endowment period. Monthly installments of $49.98 each were paid to the beneficiary through January 24, 1954, and by the terms of the Policy and supplementary provision, a final payment of $4,993.59 became payable to plaintiff on or about February 24, 1954.

VI.

On or about February 11, 1954 defendant tendered to plaintiff the final payment of $4,993.59.

VII.

On or about March 29, 1954 in answer to de-

fendant's tender and request for surrender of the Policy of Insurance No. 3223099, plaintiff claimed to be entitled to a continuation of the monthly payments for an additional five years because of the erroneous provision of the Supplementary Provision For Family Income and refused to surrender the said Policy of Insurance.

VIII.

Defendant thereupon requested of plaintiff the written contract so that its written terms might be reviewed. On or about the 25th day of March, 1954 defendant received from plaintiff a photostatic copy of said Supplementary Provision For Family Income from plaintiff. Defendant thereupon discovered and became aware of the mistake alleged aforesaid. Immediately after said discovery defendant notified plaintiff of the mistake and demanded of plaintiff that said mistake be corrected and that plaintiff accept performance by defendant according to the contract of insurance as entered into between defendant and insured, but plaintiff refused and still refuses to correct said mistake or accept such performance.

IX.

On or about the 13th day of May, 1954 defendant again tendered to plaintiff the sum of $4,993.59, but plaintiff refused and still refuses to accept the said tender.

X.

Defendant has no adequate remedy at law as against plaintiff and unless the relief asked by it

herein is granted, defendant will be irreparably damaged.

Wherefore, defendant prays that the "Supplementary Provision For Family Income" of Insurance Policy No. 3223099, a copy of which is attached to plaintiff's complaint therein as Exhibit 1, be reformed by striking the numerals "20" inserted in paragraph 1 thereof and the numerals "15" in the eighth paragraph thereof and by inserting therein the figures "15" and "10" respectively, and reforming it so that it will comply with the actual contract made between the insured and defendant as herein alleged.

That the Court declare that defendant is under no duty to make any further payments of Family Income to plaintiff and that its only obligation to plaintiff is to pay the sum of $4,993.59, without interest, and only upon surrender of Policy of Insurance No. 3223099 and the relinquishment of any alleged legal rights of further payment thereunder.

That plaintiff take nothing by reason of her complaint.

That defendant recover its costs of suit incurred herein and for such other and further relief as may be equitable herein.

KEESLING & KEESLING,
/s/ By WILLIAM H. KEESLING,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 27, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Rules of Civil Procedure, plaintiff, Mary L. Troutfelt Cohen, requests defendant, John Hancock Mutual Life Insurance Company, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That Exhibit A attached hereto is a true copy of defendant's policy No. 3223099, together with all written attachments thereto, as executed and delivered in 1939 by defendant to Martin E. Troutfelt and received by him.

2. That upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary:

(a) transmitted to defendant the original of said Exhibit A, and defendant received the same;

(b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary;

(c) transmitted and surrendered the original of said Exhibit A to defendant as a part of such proof and claim.

3. That thereafter in 1945, defendant executed and endorsed upon the original of Exhibit A the legend set forth in paragraph 5 of the complaint herein and, so endorsed, returned it to plaintiff.

4. That plaintiff's execution and endorsement of said legend occurred as part of its processing said proof of death and claim.

5. That the execution and endorsement of said legend occurred as part of defendant's procedure for determining the amount and manner of payments to be made to the beneficiary.

6. That Martin E. Troutfelt was the insured and defendant the insurer in the contract of insurance entered into between them.

7. That said policy, including the supplementary provisions and all applications attached thereto, was written on forms prepared by defendant.

8. That the written Supplementary Provision for Family Income attached to said Exhibit A was wholly prepared by defendant and that Martin E. Troutfelt had no part in its preparation.

9. That after receipt by defendant from Martin E. Troutfelt of the two applications, one dated May 31, 1939, and the other dated July 11, 1939, copies of which are attached to said Exhibit A, no authorized representative of defendant orally informed Martin E. Troutfelt that defendant bound and committed itself to issue a policy of insurance.

10. That after receipt by defendant of said two applications, the only written communication or advice by defendant to said Martin E. Troutfelt that defendant insured or agreed to insure him consisted of the delivery to him of the original of said Exhibit A.

11. That after receipt by defendant of said two applications defendant never advised Martin E.

Troutfelt that premiums under the Family Income Provision would not have to be paid by him for more than ten years from February 24, 1939 (if he lived so long) in order to entitle his beneficiary to receive Family Income payments under the Supplementary Provision for Family Income, or that it was not necessary for him to pay such premiums for fifteen years from February 24, 1939 (if he lived so long).

12. That from time to time defendant knowingly issues, and in the past has issued, life insurance policies, including supplementary provisions, which varied in their terms from those stated in the prior application of the party to be insured, and that such policies have been accepted by said party and recognized by the defendant as the contract of insurance.

13. That defendant never informed Martin E. Troutfelt that any portion of the original of said Exhibit A was a mistake or the result of a mistake.

14. That not until May, 1954, did defendant ever inform plaintiff that any portion of the original Exhibit A was claimed to be a mistake or the result of a mistake.

15. That on the application for Supplementary Provision for Family Income dated July 11, 1939, attached to the original of Exhibit A, all typewriting was inserted on the form by a representative of defendant and none by Martin E. Troutfelt.

16. That on said application the said typewritten insertions were placed on the form after the form was signed by said Martin E. Troutfelt.

17. That defendant never informed Martin E. Troutfelt that the amount of premium to be paid for the Supplementary Provision for Family Income attached to a fifteen year endowment policy, where the premium was payable for fifteen years (or until insured's death, if earlier) and the family income was payable until the termination of twenty years from the policy's issuance date, was different than if the income was payable for a period expiring fifteen years from the policy's issuance date and the premium was payable for ten years (or until insured's death, if earlier).

18. That defendant never informed Martin E. Troutfelt that it did not or would not issue a Supplementary Provision for Family Income which would exceed the term of the policy to which it was attached.

Dated: August 11, 1954.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSION

John Hancock Mutual Life Insurance Company, defendant, makes the following statement in response to the request for admission of facts and of genuineness of documents served upon it by plaintiff on August 11, 1954:

1. Defendant admits that Exhibit A, attached to plaintiff's Request for Admissions on file herein, is a true copy of defendant's policy No. 3223099, together with all written attachments thereto, as executed and delivered in 1939 by defendant to Martin E. Troutfelt and received by him.

2. Defendant admits that upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary:

(a) transmitted to defendant the original of said Exhibit A, and defendant received the same;

(b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary;

(c) transmitted and surrendered the original of said Exhibit A to defendant as a part of such proof and claim.

3. Defendant admits that thereafter in 1945, it executed and endorsed upon the original of Exhibit A the legend set forth in paragraph 5 of the complaint herein and, so endorsed, returned it to plaintiff.

4. Defendant admits that its execution and en-

dorsement of said legend occurred as part of its processing said proof of death and claim.

5. Defendant denies that the execution and endorsement of said legend occurred as part of its procedure for determining the amount and manner of payments to be made to the beneficiary. In this connection the determination of the amount and manner of payments to be made to the beneficiary is made from defendant's own Home Office records.

6. Defendant admits that Martin E. Troutfelt was the insured and defendant the insurer in the contract of insurance entered into between them.

7. Defendant admits that said policy, including the supplementary provisions and all applications attached thereto, was written on forms prepared by defendant.

8. Defendant admits that the written Supplementary Provision for Family Income attached to said Exhibit A was wholly prepared by defendant from the application therefor made by Martin E. Troutfelt dated July 11, 1939 at Albuquerque, New Mexico.

9. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 9 inasmuch as the writing agent on the policy, George E. Troutfelt, left the service of the Company on February 13, 1946.

10. Defendant is without knowledge or information as to the facts upon which it can truthfully

admit or deny plaintiff's Request No. 10 for the reasons set forth in answer to Request No. 9, except that in addition to the delivery to Martin E. Troutfelt of the original Exhibit A defendant issued its official receipt for the premium for the term, plan, and amount for which said Martin E. Troutfelt made application.

11. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 11 for the reasons set forth in answer to Request No. 9.

12. Defendant denies that from time to time it knowingly issues, and in the past has issued, life insurance policies, including supplementary provisions, which varied in their terms from those stated in the prior application of the party to be insured, and that such policies have been accepted by said party and recognized by defendant as the contract of insurance. In this connection, no policy with or without supplementary provisions, the terms of which varied from those stated in the original application, would be issued by the defendant unless such application had been modified by an amendment to the application signed by the party to be insured.

13. Defendant admits that it never informed Martin E. Troutfelt that any portion of the original of said Exhibit A was a mistake or the result of a mistake.

14. Defendant admits that not until May, 1954, did defendant ever inform plaintiff that any por-

tion of the original Exhibit A was claimed to be a mistake or the result of a mistake.

15. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 15 for the reasons set forth in answer to Request No. 9.

16. Defendant denies that on said application the said typewritten insertions were placed on the form after the form was signed by said Martin E. Troutfelt.

17. Defendant admits plaintiff's Request No. 17 because no such difference could be described as the defendant never offers or agrees to issue a supplementary provision for Family Income for a period of income payments extending beyond the maturity date of an endowment policy with which it had been issued.

18. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 18 for the reasons set forth in answer to Request No. 9.

State of Massachusetts
County of Suffolk—ss.

Charles N. Ladd, being duly sworn, says: That he is the Assistant Secretary of the John Hancock Mutual Life Insurance Company, a corporation, the above named defendant, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Response to Request for Admission and knows the

contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ CHARLES N. LADD,
Assistant Secretary.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 30, 1954.

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT

Pursuant to Rule 33 of the Rules of Civil Procedure, plaintiff, Mary L. Troutfelt Cohen, requests that defendant John Hancock Mutual Life Insurance Company, a corporation, answer the following interrogatories under oath within 15 days after service thereof:

1. Upon what facts, events and circumstances does defendant rely as showing or tending to show that through mutual mistake of defendant and insured, and by accident, policy #3223099 (including the Supplementary Provision for Family Income attached thereto), issued and delivered by defendant to Martin E. Troutfelt, was not the contract of the parties.

2. If among the facts, events and circumstances stated in reply to Interrogatory 1 are writings of any kind;

(a) identify any such writing;

(b) attach a copy to your answer, or set out its contents.

3. Does defendant intend to rely on the testimony of any person as showing or tending to show any of the said facts, events and circumstances?

4. If the answer to Interrogatory 3 is "yes";

(a) give the name, address and occupation of any such person;

(b) summarize the expected testimony of each such person.

5. Upon what facts, events and circumstances does defendant rely as showing or tending to show that Martin E. Troutfelt knew, believed, or should have known that policy #3223099 (including the Supplementary Provision for Family Income attached thereto), issued and delivered by defendant to Martin E. Troutfelt, was not the policy defendant intended to issue, or believed that it was issuing, to said insured.

6. If among the facts, events and circumstances stated in reply to Interrogatory 5 are writings of any kind;

(a) identify any such writing;

(b) attach a copy to your answer, or set out its contents.

7. Does defendant intend to rely on the testimony of any person as showing or tending to show any of the said facts, events and circumstances?

8. If the answer to Interrogatory 7 is "yes";

(a) give the name, address and occupation of any such person;

(b) summarize the expected testimony of each such person.

9. Did defendant keep in its files a copy of the policy of which Exhibit A to plaintiff's Request for Admissions is a copy, after delivering the original thereof to Martin E. Troutfelt in 1939?

Dated October 8, 1954.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON.

Affidavit of Mailing Attached.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiff replies to the Counterclaim of defendant as follows:

1. Replying to paragraph I of the Counterclaim, plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment that the amount of the premium provided for in the Supplementary Provision for Family Income attached to Policy #3171136 was $52.95 annually.

2. Replying to paragraph II of the Counterclaim, plaintiff admits that on or about May 31,

1939, Martin E. Troutfelt executed an application to defendant, and alleges that a true copy thereof appears as part of Exhibit A attached to plaintiff's Request for Admissions filed August 11, 1954; admits that on or about July 11, 1939 said Martin E. Troutfelt executed an application to defendant, and alleges that a true copy appears as part of Exhibit A attached to plaintiff's Requests for Admissions filed August 11, 1954; alleges that thereafter and on or about July 27, 1939 defendant executed and issued (as of February 24, 1939) its Policy #3223099, including a Supplementary Provision for Family Income in the exact form of Exhibit 1 attached to the Complaint, and that Exhibit A attached to plaintiff's Requests for Admissions filed August 11, 1954 is a true copy of said policy as executed by defendant in 1939; alleges that thereupon defendant tendered and delivered said policy with said Supplementary Provision for Family Income as its contract of insurance to Martin E. Troutfelt, that said Troutfelt then received and accepted the same, surrendered Policy #3171136 to defendant, paid to defendant the sum of $37.70 for the cost of conversion, the first installment of the premium provided for in said policy, and the first installment of the premium provided for in said Supplementary Provision for Family Income; admits that each of said applications, together with the original application for the old policy of insurance #3171136, was attached to Policy #3223099; and denies all the other allegations of said paragraph II.

3. Plaintiff denies all the allegations of paragraph III of the Counterclaim.

4. Replying to paragraph IV of the Counterclaim, admits that at the time the insured contracted with the defendant for the converted policy of insurance, including supplementary agreements, to wit, at the time said policy of insurance including said supplementary agreements were delivered by defendant to the insured and accepted by the latter, and at all times since such delivery and acceptance the insured, until his death, and the defendant believed that the written policy of insurance, including said supplementary agreements, and delivered by defendant to the insured, were, and plaintiff alleges that they were in fact, the policy of insurance contracted for between defendant and the insured and that they did give to the insured the insurance agreed upon by insured and defendant; admits that the premium of $43.20 was the premium charged and paid annually by the insured during his lifetime for the said Supplementary Provision for Family Income; denies that there was ever any mutual mistake or accident or mistake at all, and denies that the premium of $43.20 provided to be paid annually was for any so-called 15 year plan; denies each and every other allegation of said paragraph IV.

5. Replying to paragraph V of the Counterclaim, plaintiff admits that upon the insured's death, June 28, 1945, defendant commenced payment under the Supplementary Provision for Family Income; ad-

mits that monthly installments of $49.98 each were paid to the beneficiary through January 24, 1954; and denies all the other allegations of said paragraph V.

6. Replying to paragraph VI of the Counterclaim, plaintiff admits and alleges that on or about February 11, 1954 defendant tendered to plaintiff the sum of $4,993.59 on condition that plaintiff surrender Policy #3223099 and all her rights thereunder; denies all other allegations of paragraph VI.

7. Replying to paragraph VII of the Counterclaim, plaintiff admits that on or about March 29, 1954, and in answer to defendant's said tender and request for surrender of the Policy of Insurance #3223099, plaintiff claimed to be entitled to a continuation of the monthly payments for an additional five years and refused to surrender the said policy of insurance; denies all the other allegations of said paragraph VII.

8. Replying to paragraph VIII of the Counterclaim, plaintiff admits that defendant thereupon requested of plaintiff the written contract, and that on or about March 25, 1954, defendant received from plaintiff a photostatic copy of said Supplementary Provision for Family Income; and denies all the other allegations of said paragraph.

9. Replying to paragraph IX of the Counterclaim, plaintiff admits and alleges that on or about May 13, 1954, defendant again tendered to plaintiff the sum of $4,993.59 on condition that plaintiff sur-

render Policy #3223099 and all her rights thereunder and that plaintiff refused and still refuses to accept the said tender; denies all other allegations of paragraph IX.

10. Plaintiff denies all the allegations of paragraph X of the Counterclaim.

Second Defense

Exhibit A attached to Plaintiff's Request for Admissions filed August 11, 1954 is a true copy of Policy of Insurance #3223099 issued to Martin Troutfelt in 1939 and referred to in the complaint herein. Said policy contained and contains the following incontestability clause:

> "This policy, except any supplementary provision hereof granting any benefit for total and permanent disability, or granting any additional insurance specifically against death caused by certain bodily injuries sustained through accidental means, shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premium, and except that if the Insured's age has been misstated, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age."

Said policy was in force during the lifetime of the insured from its issuance in 1939 to his death in 1945. By virtue thereof defendant is barred from seeking reformation of the Supplementary Provision for Family Income.

Third Defense

1. If any mistake occurred, as alleged in defendant's answer and counterclaim, which plaintiff denies, it occurred in 1939.

2. Upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary, made and delivered to defendant due proof of said insured's death and of plaintiff's claim as beneficiary, and as part of such proof and claim transmitted and surrendered to defendant, and defendant received, the original of said policy No. 3223099, a true copy of which is attached to Plaintiff's Request for Admissions filed August 11, 1954 as Exhibit A.

3. Defendant thereupon had the opportunity to read, did read, and should have read said policy and, as part of defendant's processing of said proof of death and claim, defendant in 1945 endorsed and executed on said policy No. 3223099 the legend set forth and quoted in paragraph 5 of the Complaint herein, viz.:

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.
> John Hancock Mutual Life Insurance Company
> By [Sig.] Elmer L. French, Secretary
> Dated at Boston, Mass., July 26, 1945."

and thereafter in 1945 defendant returned said policy, so endorsed, to plaintiff.

4. The defendant then and there discovered in law any alleged mistake, if one existed.

5. The alleged affirmative defense of mistake and the alleged right of action set forth in the Counterclaim accrued, and the discovery by defendant of the alleged mistake on which the Counterclaim is based occurred, more than three years before the commencement of this action or the filing of the Counterclaim, and the Counterclaim and the alleged affirmative defense of mistake are and each is barred by the statute of limitations.

Fourth Defense

The alleged affirmative defense of mistake and the cause of action set forth in the Counterclaim is barred by the provisions of Section 338, subdivision 3, of the California Code of Civil Procedure.

Fifth Defense

The alleged affirmative defense of mistake and the alleged right of action set forth in the Counterclaim did not accrue within four years next before the commencement of this action or the filing of the Counterclaim and is barred by the statute of limitations.

Sixth Defense

The alleged affirmative defense of mistake and the alleged cause of action set forth in the Counterclaim is barred by the provisions of Section 337, subdivision 1, of the California Code of Civil Procedure.

Seventh Defense

The alleged affirmative defense of mistake and the alleged cause of action set forth in the Counter-

claim is barred by the provisions of Section 343 of the California Code of Civil Procedure.

Eighth Defense

The alleged affirmative defense of mistake and the cause of action set forth in the Counterclaim is barred by the provisions of Section 339, subdivision 1, of the California Code of Civil Procedure.

Ninth Defense

1. After the said written policy of insurance, including said Supplementary Provision for Family Income, was prepared by defendant's scrivener, and before issuance and delivery to Martin E. Troutfelt, it was submitted to, examined by, and executed by defendant's Registrar acting on his own behalf and on behalf of its president and secretary, said policy and said Supplementary Provision were countersigned by said Registrar, and said policy, including said Supplementary Provision, was endorsed and executed by defendant's secretary thus:

> "This Policy is issued, effective on the date of this endorsement as of its date of issue, in conversion of Policy No. 3171136, dated February 24, 1939, which is terminated as of the date of this endorsement, and in consideration of the surrender of the said policy and the payment of Thirty Seven and 70/100 Dollars, for the cost of the said conversion.

John Hancock Mutual Life Insurance Company,
By Charles J. Diman,
Secretary.

Dated at Boston, Mass., July 27, 1939."

2. Thereafter defendant permitted the insured to pay premiums throughout the remainder of his lifetime in reliance on the policy as written.

3. Plaintiff incorporates herein the allegations of paragraphs 2 and 3 of its Third Defense to the Counterclaim.

4. Thereby defendant represented, and promised plaintiff in writing, that it would pay plaintiff in accordance with the Supplementary Provision for Family Income as written and attached to the policy.

5. Thereby, also, defendant ratified the policy and Supplementary Provision for Family Income, as written.

6. Defendant never informed Martin E. Troutfelt that any portion of said policy No. 3223099 was a mistake or the result of a mistake and defendant did not inform plaintiff that any portion of said policy was claimed to be a mistake or the result of a mistake until May of 1954.

7. Had the defendant advised plaintiff in 1945, upon its return of the policy to her of its claim of mistake, plaintiff could have examined the papers and effects of her deceased husband, the insured,

for evidence that might cast light on insured's understanding of the policy, but papers and effects of insured, long ago thought to be valueless, were thereafter destroyed after his death.

8. By reason of the facts stated above, defendant was guilty of negligence and gross negligence in preparing, issuing, examining and handling said insurance policy, and in each and every one of its dealings with said policy, is estopped from asserting any alleged mistake with respect to the Supplementary Provision for Family Income, and is guilty of laches in now seeking reformation over fourteen years after the issuance of said policy and Supplementary Provision, and over eight years after the death of the insured and the execution of the legend referred to in paragraph 3 above.

Tenth Defense

The Counterclaim fails to state a claim on which relief can be granted.

Wherefore, plaintiff prays that defendant take nothing by its counterclaim, and that judgment be entered for plaintiff in accordance with the prayer of the complaint.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 6, 1954.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES PROPOUNDED BY PLAINTIFF

Now comes defendant John Hancock Mutual Life Insurance Company, a corporation, and in response to the interrogatories propounded by plaintiff answers as follows:

No. 1. Defendant relies upon the insured's specifications for coverage set forth in his applications and his signed verifications therein that the statements and answers contained therein were complete, true and correctly recorded and formed the bases of the contract of insurance and of the Supplementary provision for family income; the amount of premium paid for coverage; the type of Family Income Rider customarily issued by the company under the type of policy issued to insured; the company's practice of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant; and the fact that the company never considered policy No. 3223099 with the Supplementary Provision for Family Income attached thereto to be representative of the contract of insurance entered into between the company and the insured.

No. 2.

(a) Application for insurance for Policy No. 3171136, dated February 1, 1939; application for exchange or conversion of policy made by the in-

sured dated May 31, 1939; application for Supplementary Provision for Family Income dated July 11, 1939; ordinary policy modification record dated July 27, 1939.

(b) Copies thereof are attached hereto.

No. 3. Yes.

No. 4.

(a) Alfred Keefe, Regional Supervisor, John Hancock Mutual Life Insurance Co., 805 N. Brand Boulevard, Glendale 3, Calif.

Franklin G. Bowen, Section Head, John Hancock Mutual Life Insurance Co., 110 North Central Avenue, Wollaston, Mass.

(b) The expected testimony of Mr. Keefe is that at the time the original policy was written the insured, a brother of the company's agent, George Troutfelt, came to San Francisco from Albuquerque, New Mexico, where he resided, and executed the application for policy No. 3171136 in San Francisco in the presence of Agent George Troutfelt and himself. Mr. Keefe explained the contract fully to the insured, who had full knowledge of the type of policy he was applying for at the time that the original application was written. The matter of conversion from policy No. 3171136 to policy No. 3223099 was handled by mail. The forms were executed and witnessed in Albuquerque. Mr. Keefe will testify that under no circumstances would he have informed the insured that the insured could have obtained a twenty-year Family Income rider on a fifteen-year Endowment policy; that the company

would not under any circumstances accept application for a Family Income rider covering a period which would extend beyond the term of the policy itself which, in this case, was fifteen years.

The expected testimony of Mr. Bowen is concerning the company's procedure in writing policies at the time of issuance of converted policy No. 3223099 when he was company Registrar, the type of Family Income Rider then customarily issued by the company under the type of policy issued by the insured, and the company's practice at that time of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant.

No. 5. Defendant relies upon insured's applications for policy and Supplementary Provision for Family Income, the amount of premium paid for coverage, wherein he applied for the Family Income Rider for a fifteen-year duration with a ten-year term for the payment of premiums, rather than his previous insurance with a twenty-year duration and a fifteen-year term for the payment of premiums; the change of premium from $52.95 to $43.20.

No. 6. Such writings are identified and attached hereto as set forth in answer to No. 2 above.

No. 7. Yes.

No. 8. See answer to No. 4 above.

No. 9. No.

Dated: November 30, 1954.

/s/ CHARLES N. LADD.

Subscribed and sworn to before me by Charles N. Ladd, Assistant Secretary of John Hancock Mutual Life Insurance Company, at Boston, Massachusetts, on this the 30th day of November, A.D., 1954.

[Seal] /s/ THOMAS H. SMITH,

Notary Public in and for the Commonwealth of Massachusetts. My commission expires June 18, 1959.

Affidavit of Service Attached.

[Endorsed]: Filed Dec. 7, 1954.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES PROPOUNDED BY PLAINTIFF

Now comes defendant John Hancock Mutual Life Insurance Company, a corporation, and in response to the interrogatories propounded by plaintiff answers as follows:

No. 1. Defendant relies upon the insured's specifications for coverage set forth in his applications and his signed verifications therein that the statements and answers contained therein were complete, true and correctly recorded and formed the bases of the contract of insurance and of the Supplementary provision for family income; the amount of premium paid for coverage; the type of Family Income Rider customarily issued by the company under the type of policy issued to insured; the company's practice of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant; and the fact that the company never considered policy No. 3223099 with the Supplementary Provision for Family Income attached thereto to be representative of the contract of insurance entered into between the company and the insured.

No. 2.

(a) Application for insurance for Policy No. 3171136, dated February 1, 1939; application for exchange or conversion of policy made by the in-

sured dated May 31, 1939; application for Supplementary Provision for Family Income dated July 11, 1939; ordinary policy modification record dated July 27, 1939.

(b) Copies thereof are attached hereto.

No. 3. Yes.

No. 4.

(a) Alfred Keefe, Regional Supervisor, John Hancock Mutual Life Insurance Co., 805 N. Brand Boulevard, Glendale 3, Calif.

Franklin G. Bowen, Section Head, John Hancock Mutual Life Insurance Co., 110 North Central Avenue, Wollaston, Mass.

(b) The expected testimony of Mr. Keefe is that at the time the original policy was written the insured, a brother of the company's agent, George Troutfelt, came to San Francisco from Albuquerque, New Mexico, where he resided, and executed the application for policy No. 3171136 in San Francisco in the presence of Agent George Troutfelt and himself. Mr. Keefe explained the contract fully to the insured, who had full knowledge of the type of policy he was applying for at the time that the original application was written. The matter of conversion from policy No. 3171136 to policy No. 3223099 was handled by mail. The forms were executed and witnessed in Albuquerque. Mr. Keefe will testify that under no circumstances would he have informed the insured that the insured could have obtained a twenty-year Family Income rider on a fifteen-year Endowment policy; that the company

would not under any circumstances accept application for a Family Income rider covering a period which would extend beyond the term of the policy itself which, in this case, was fifteen years.

The expected testimony of Mr. Bowen is concerning the company's procedure in writing policies at the time of issuance of converted policy No. 3223099 when he was company Registrar, the type of Family Income Rider then customarily issued by the company under the type of policy issued by the insured, and the company's practice at that time of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant.

No. 5. Defendant relies upon insured's applications for policy and Supplementary Provision for Family Income, the amount of premium paid for coverage, wherein he applied for the Family Income Rider for a fifteen-year duration with a ten-year term for the payment of premiums, rather than his previous insurance with a twenty-year duration and a fifteen-year term for the payment of premiums; the change of premium from $52.95 to $43.20.

No. 6. Such writings are identified and attached hereto as set forth in answer to No. 2 above.

No. 7. Yes.

No. 8. See answer to No. 4 above.

No. 9. No.

Dated: November 30, 1954.

/s/ CHARLES N. LADD.

Subscribed and sworn to before me by Charles N. Ladd, Assistant Secretary of John Hancock Mutual Life Insurance Company, at Boston, Massachusetts, on this the 30th day of November, A.D., 1954.

[Seal] /s/ THOMAS H. SMITH,

Notary Public in and for the Commonwealth of Massachusetts. My commission expires June 18, 1959.

Affidavit of Service Attached.

[Endorsed]: Filed Dec. 7, 1954.

[Title of District Court and Cause.]

STATEMENT OF ADMITTED FACTS

For the Court's convenience, we set forth here certain facts admitted either by the pleadings or by defendant's response to plaintiff's Requests for Admissions.

1. Defendant is and at all times mentioned in the complaint was a Massachusetts corporation authorized to do and doing business in California. (Complaint, para. 1; Answer, para. I.)

2. Defendant issued and delivered to Martin E. Troutfelt its policy of insurance No. 3223099. (Answer, para. III.)

3. This policy was delivered to the insured in 1939 and received by him. (R.A. 1.)

Exhibit A attached to plaintiff's Request for Admissions is a true copy of policy No. 3223099, together with all written attachments thereto, as executed and delivered in 1939 by defendant to Martin E. Troutfelt and received by him. (R.A. 1.)

5. One of the supplements attached to and made a part of said policy is a "Supplementary Provision for Family Income". A true copy of said supplement as written and attached to said policy is attached to plaintiff's complaint as Exhibit 1. (Complaint, para. 4; Answer, para. III.) Said supplement provides in material part:

"If * * * the death of the Insured shall occur

within 20 years from the date hereof [February 24, 1939], the Company * * * will, in lieu of immediate payment of the amount insured in one sum, pay to the beneficiary * * * on the first day of each policy month following the death of the Insured, a monthly income * * * the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of issue of this provision. Upon the expiration of the said period the Company will pay the amount insured. * * *

* * * * *

"The special premium [for this monthly income] will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issue of this provision."

It is the obligation imposed by the underscored language which defendant refuses to perform.

6. The insured duly performed all of the conditions on his part agreed to be performed in and by said contract. (Complaint, para. 8; admitted by failure to deny.)

7. Martin E. Troutfelt died June 28, 1945. At all times mentioned in the complaint prior thereto, he and plaintiff were husband and wife. (Complaint, paragraph 2; admitted by failure to deny.)

8. Upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary:

(a) transmitted to defendant the original of said policy No. 3223099, and defendant received the same;

(b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary;

(c) transmitted and surrendered the original of said policy No. 3223099 to defendant as a part of such proof and claim. (R.A. 2.)

9. There after in 1945 defendant executed and endorsed upon the original policy No. 3223099 the legend set forth in paragraph 5 of the complaint and, as so endorsed, returned it to plaintiff. (R.A. 3.)

10. The legend above referred to reads as follows:

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.
>
> "John Hancock Mutual Life Insurance Company,
>
> By (Sig.) Elmer L. French, Secretary
>
> Dated at Boston, Mass., July 26, 1945."

(Complaint, para. 5; Answer, para. IV.)

11. Defendant's execution and endorsement of said legend occurred as part of its processing said proof of death and claim. (R.A. 4.)

12. Martin E. Troutfelt was the insured and de-

fendant the insurer in the contract of insurance entered into between them. (R.A. 6.)

13. Said policy, including the supplementary provisions and all applications attached thereto, was written on forms prepared by defendant. (R.A. 7.)

14. The written Supplementary Provision for Family Income attached to said policy No. 3223099 was wholly prepared by defendant and Martin E. Troutfelt had no part in its preparation. (R.A. 8.)

15. After receipt by defendant from Martin E. Troutfelt of the two applications, one dated May 31, 1939 and the other dated July 11, 1939, copies of which are attached to policy No. 3223099, no authorized representative of defendant orally informed Martin E. Troutfelt that defendant bound and committed itself to issue a policy of insurance. (R.A. 9.) [That is to say, Troutfelt's first notification of defendant's willingness to insure him was receipt of the policy itself.]

16. After receipt by defendant of said two applications, the only written communication or advice by defendant to Martin E. Troutfelt that defendant insured or agreed to insure him consisted of the delivery to him of the original of policy No. 3223099. (R.A. 10.)

17. After receipt by defendant of said two applications defendant never advised Martin E. Troutfelt that premiums under the Family Income Provision would not have to be paid by him for more than ten years from February 24, 1939 (if he lived so long)

in order to entitle his beneficiary to receive Family Income payments under the Supplementary Provision for Family Income, or that it was not necessary for him to pay such premiums for fifteen years from February 24, 1939 (if he lived so long). (R.A. 11.) [That is to say, defendant never notified Troutfelt that he would not have to pay the premiums called for in the supplementary provision.]

18. Defendant never informed Martin E. Troutfelt that any portion of the original of policy No. 3223099 was a mistake or the result of a mistake. (R.A. 13.)

19. Not until May, 1954 did defendant ever inform plaintiff that any portion of the original of policy No. 3223099 was claimed to be a mistake or the result of a mistake. (R.A. 14.)

20. On the application for Supplementary Provision for Family Income dated July 11, 1939, attached to the original of policy No. 3223099, all typewriting was inserted on the form by a representative of defendant and none by Martin E. Troutfelt. (R.A. 15.)

21. Defendant never informed Martin E. Troutfelt that the amount of premium to be paid for the Supplementary Provision for Family Income attached to a fifteen-year endowment policy, where the premium was payable for fifteen years (or until insured's death, if earlier) and the family income was payable until the termination of twenty years from the policy's issuance date, was different than

if the income was payable for a period expiring fifteen years from the policy's issuance date and the premium was payable for ten years (or until insured's death, if earlier). (R.A. 17.)

22. Defendant never informed Martin E. Troutfelt that it did not or would not issue a Supplementary Provision for Family Income which would exceed the term of the policy to which it was attached. (R.A. 18.)

23. After the death of the insured, defendant paid to plaintiff each month the sum of $49.98 to and including February 1, 1954. (Complaint, para. 9; Answer, para. VIII.)

24. Since February 1, 1954, defendant has failed and refused and continues to fail and refuse to pay any further monthly sum. (Complaint, para. 10; Answer, para. IX.)

25. On or about May 13, 1954, defendant notified plaintiff in writing that it "does not consider it is liable for any further monthly payments under the family income provision, but is only liable for final payment of $4,993.59, which was due and payable on February 24, 1954." (Complaint, para. 11; admitted by failure to deny.)

26. An actual controversy exists between plaintiff and defendant. Plaintiff asserts that under said contract defendant is under the legal duty to pay to her, and plaintiff has the legal right to receive from defendant, the family income payments of $50 per month for each and every month to and including

February 1, 1959, in addition to the sum of $5,000, and further asserts that in view of said anticipatory breach by defendant, plaintiff has the legal right to receive and defendant is under the legal duty to pay to plaintiff, forthwith, the said entire sum of $8,000. The defendant asserts that it is under no duty to make any further payments of family income to the plaintiff and further asserts that its only obligation to plaintiff is to pay the sum of $4,993.59 and then only in the event plaintiff should surrender the policy and relinquish all rights to further payment thereunder. (Complaint, para. 12; admitted by failure to deny.)

Respectfully submitted,

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 9, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiff brought suit in the California state court to recover sums alleged to be due her as beneficiary of a life insurance policy between defendant company and plaintiff's deceased husband. Defendant removed the suit to this Court on the basis of diversity of citizenship.

Under the policy originally issued to the insured,

the insured was to pay premiums for twenty years (or until maturity of the policy) and the face amount of the policy was payable to the beneficiary upon the death of the insured. There was attached a supplementary provision for family income. This provision required the insured to pay an additional premium for fifteen years, and provided for monthly payments to the beneficiary for a period not to exceed twenty years from the date of the policy, only in the event of the death of the insured within twenty years from the date of the policy.

Within a few months after the original policy was issued, the insured applied for conversion of the main policy to a fifteen year endowment policy. The application also requested a family income rider under which the insured would pay an additional premium for ten years, and his beneficiary would get monthly payments for a period not to exceed fifteen years from the date of the policy if the insured died within fifteen years from the date of the policy.

In issuing the new policy to the insured, defendant insurer made a mistake in the family income rider. The rider actually issued provided for the payment of an additional premium for fifteen years (instead of ten), and for monthly benefits for a period not to exceed twenty years (instead of fifteen years) from the date of the policy if the insured died within twenty years from the date of the policy. Defendant charged the insured a premium that would have been correct for the rider applied

for, but was ten dollars per year less than the correct premium for the rider as issued.

The insured died about six years after the policy was issued. Plaintiff claims to be entitled to monthly benefits under the family income rider as actually issued, for a period up to twenty years from the date of the policy. Under the defense of mistake, defendant claims it is liable for monthly payments for a period not in excess of fifteen years from the date of the policy, because the insured applied for such a rider and paid the premium for it; and, on the ground of mistake, defendant counterclaims for reformation of the policy so that it will conform to the policy applied for by the insured.

Defendant's counterclaim for equitable relief is barred by the applicable statute of limitations. Under California Code of Civil Procedure §338(4), an action for relief on the ground of fraud or mistake must be begun within three years after discovery of the facts constituting the fraud or mistake. But under this section, "It is well settled, of course, that the means of knowledge are the equivalent of knowledge." Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 703-704. The mistake relied upon by the defendant occurred about the time the policy was issued in 1939. In 1945 the policy was returned to the defendant after the death of the insured. At that time the following statement was typed upon the policy and signed by an officer of the defendant:

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto."

The conclusion is inescapable that defendant had the means of discovering its mistake at the time it received the original policy from the beneficiary and processed her claim. Yet defendant alleges that it did not discover its error until 1954, nine years after it endorsed on the policy the statement quoted above. Nothing is offered by way of excuse for defendant's failure to discover its mistake within three years after it occurred. In Bradbury v. Higginson, 167 Cal. 553, 558 the California Supreme Court said:

> "But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute. [citations omitted] It is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon." [citations omitted].

There is no proof of facts tending to excuse defendant's failure to discover its mistake within three years after it occurred, or at least within six years after it occurred (when it processed the beneficiary's claim).

There is nothing in the proof to excuse defendant's lack of diligence, and therefore it is the conclusion of this Court that by the exercise of ordinary care, the defendant could have discovered its

mistake in 1945, nine years before it set up its claim for equitable relief by way of counterclaim.

Even if the statute of limitations had not barred defendant's counterclaim plaintiff would prevail because defendant has failed to prove mutual mistake; defendant has not shown that the insured knew or should have known of defendant's mistake.

Defendant argues that the policy issued was different from the policy applied for by the insured, and therefore the insured must have noticed the difference. It is entirely possible, however, that the insured noticed the difference and acquiesced in it, assuming that the company intentionally made the change, either because it could not write the policy as applied for or because it preferred not to write it in accordance with the application. In Metropolitan Life Insurance Co. v. Banion, 10th Cir., 106 F. 2d 561, 567 the court said:

> "But an insurance company may make a binding contract of insurance by issuing and delivering the policy and accepting the premium upon it, even though the insured applied for a different kind of policy. The issuance, delivery, and acceptance of the policy, and the payment, acceptance, and retention of the premium can constitute an enforceable contract of insurance despite the fact that it departs in some respects from the policy outlined in the application."

The policy as issued obligated the insurer to pay monthly benefits to the beneficiary for a period five years longer than the policy applied for, but it also

required the insured to pay premiums for a period five years longer than the policy applied for. Therefore it would be reasonable for the insured to believe that the changes were intentional, if he noticed them, since the obligation of the insured to pay premiums appeared to be increased to the same extent that the policy increased the obligation of the insurer to make monthly payments.

Defendant also argues that the insured must have known that defendant had made a mistake from the fact that the insured was charged a premium that was correct for the policy applied for, but was ten dollars per year less than the correct premium for the policy as issued. This line of argument is not convincing. The premium under the original policy and the premium paid by the insured under the policy after conversion both were computed on the basis of five different types of insurance coverage. Each of those five types of coverage were changed to some extent when the policy was converted. The premium for each type of coverage was different under the converted policy, some were higher, some lower. The quarterly premium under the original policy was $66.60, the quarterly premium paid by the insured under the converted policy was $104.30. The correct quarterly premium under the converted policy as issued would have been $2.70 more than $104.30. This difference is too slight to amount to proof that the insured must have known he was being charged too little. Furthermore, the correct premium does not appear anywhere on the policy.

Of course it is difficult to prove that a person

who is now deceased knew or should have known of a mistake, but defendant had the burden of proof, and failed to sustain it.

Plaintiff seeks an award of attorney's fees, claiming that the following language which appears on the face of the policy constitutes an implied agreement by defendant to pay attorney's fees:

> "It is not necessary to employ any firm or person to collect the proceeds of this policy."

The California rule is clear that an award of attorney's fees must be authorized by statute or by an agreement of the parties. California Code of Civil Procedure §1021; Williams v. Krumsiek, 102 Cal. App. 2d 541, 545. There is no statutory authority for an attorney's fee here; the only question is whether the quoted language creates an implied liability on the part of defendant to pay attorney's fees when any policy holder has to bring an action to recover under the policy.

It is very unusual for an insurer to promise to pay attorney's fees in the event that a dispute with an insured should lead to litigation; consequently the language creating such unusual liability ought to be clear and free from ambiguity. In the opinion of this Court the quoted language is not sufficiently definite. If the clause in question was meant to apply to attorney's fees, the phrase "attorney's fees" could easily have been used. In DeMirjian v. Ideal Heating Corp., 91 Cal. App. 2d 905, 911, in holding that a conventional provision for attorney's fees does not create an obligation to pay such fees in an action brought to recover damages arising

solely out of the promisor's negligence, the court said:

> "If such unusual and extensive liability is to be created, it must be by clearly expressed agreement of the parties and not by means of a mere interpretation of vague, general language, such as the parties here employed."

Accordingly, plaintiff's prayer for attorney's fees is denied.

Plaintiff, therefore, is entitled to judgment for the full balance due on the insurance policy as issued in the sum of $8,000.00. Plaintiff is also entitled to interest on all payments which have accrued but which have not been paid. Counsel for plaintiff is directed to prepare findings, conclusions and judgment in accordance herewith.

Dated: May 12, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed May 14, 1955.

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT TO COMPLAINT

Plaintiff having moved for an order permitting an amendment to her Complaint, and good cause appearing therefor,

It Is Hereby Ordered that plaintiff may amend

her Complaint by filing the Amendment thereto, a copy of which is attached to her said motion.

Dated: July 6, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed July 6, 1955.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Leave of Court having been first duly obtained, plaintiff Mary Troutfelt Cohen hereby amends her complaint to add thereto a paragraph numbered 13, and to amend the prayer thereof, both as follows:

"13. Said contract of insurance provided that:

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

It has been necessary for plaintiff to employ a firm and a person, to wit, Messrs. Brobeck, Phleger & Harrison and Moses Lasky, Esq., in order to collect the proceeds of said policy, and the reasonable cost and expense thereof is $1500.00, and plaintiff has been specially damaged as a result thereof in the sum of $1500.00.

"Wherefore, plaintiff prays judgment against defendant in the sum of $9,500.00, plus interest at the rate of 7% per annum to the date of entry of judgment on $50.00 from March 1, 1954, on $50.00 from April 1, 1954, on $50.00 from May 1, 1954, on

$50.00 from June 1, 1954, on $50.00 from July 1, 1954, on $50.00 from August 1, 1954, on $50.00 from September 1, 1954, on $50.00 from October 1, 1954, on $50.00 from November 1, 1954, on $50.00 from December 1, 1954, on $50.00 from January 1, 1955, on $50.00 from February 1, 1955, on $50.00 from March 1, 1955, on $50.00 from April 1, 1955, on $50.00 from May 1, 1955, on $50.00 from June 1, 1955, and on $50.00 from July 1, 1955, for a declaration of the rights and duties of plaintiff and defendant under said policy and contract of insurance, for her costs of suit herein incurred, and for such other and further relief as may be meet and proper."

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1955.

[Title of District Court and Cause.]

STIPULATION RE ANSWER

It Is Hereby Stipulated that defendant's answer to plaintiff's complaint, as amended, may be deemed amended to deny the allegations of paragraph 13 of said complaint as amended, provided, however, that defendant reserves its objections and excep-

tions to the order allowing plaintiff to file such amendment.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

/s/ WM. H. KEESLING,
/s/ HENRY C. CLAUSEN, JR.,
KEESLING & KEESLING,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 10, 1955.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on February 9, 1955 before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, now makes and orders filed its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

1. At all times herein mentioned, and at the time this action was commenced and removed to this

Court, plaintiff Mary Troutfelt Cohen was and is a citizen of the State of New Mexico, and defendant John Hancock Mutual Life Insurance Company was and is a corporation duly incorporated, organized and existing under the laws of the State of Massachusetts and a citizen thereof and doing business in the State of California.

2. The matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs and is a civil action between citizens of different states.

3. At all times herein mentioned until his death, plaintiff was the wife of one Martin E. Troutfelt.

4. In 1939 defendant, as insurer, and said Troutfelt, as the insured, entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099 including the supplements attached thereto. Plaintiff was named beneficiary of said contract. By the terms of said contract, said Troutfelt was to pay premiums for 15 years from the effective date thereof or until his earlier death, in consideration of which defendant agreed to pay plaintiff the face amount of $5,000 in the event of Troutfelt's death.

5. As a part of said contract, and attached to said policy No. 3223099 were several supplements, one of which was styled "Supplementary Provision for Family Income". By the terms thereof said Troutfelt was to pay additional premiums for a period of 15 years from the effective date of the contract or until his earlier death, in consideration

of which defendant agreed to make monthly payments of $50 per month to plaintiff for a period beginning upon the first day of the month following the death of said insured and extending to and including February 1, 1959, and at the end of said period to pay to plaintiff the $5,000 face amount referred to in paragraph 4 above.

6. Said Troutfelt duly paid, and defendant accepted, all the premiums called for by said contract, and duly performed all the conditions on his part to be performed.

7. Defendant never informed said Troutfelt that said contract or any term or part thereof was a mistake or the result of a mistake, and said Troutfelt neither knew nor suspected, nor reasonably could or should have known or suspected any mistake therein, and any mistake in writing the premium payment term in the said "Supplementary Provision for Family Income" as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, or in any other respect, was not a mutual mistake but was the unilateral mistake of defendant alone.

8. After the said policy No. 3223099, including said Supplementary Provision for Family Income, was prepared by defendant's scrivener, and before its issuance and delivery to said Troutfelt, it was submitted to, examined by and executed by defendant's registrar acting on his own behalf and on behalf of its president and secretary. Said policy and supplementary provision were countersigned by

said registrar and said policy, including said supplementary provision, were endorsed and executed by defendant's secretary, thus:

> "This Policy is issued effective on the date of this endorsement as of its date of issue, in conversion of Policy No. 3171136, dated February 24, 1939, which is terminated as of the date of this endorsement, and in consideration of the surrender of the said Policy and the payment of Thirty Seven and 70/100 Dollars, for the cost of the said conversion.
>
> John Hancock Mutual Life Insurance Company
>
> By Charles J. Diman,
> Secretary
>
> Dated at Boston, Mass., July 27, 1939."

9. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1939.

10. Upon the death of said Troutfelt in 1945 plaintiff, his beneficiary, made and delivered to defendant due proof of said Troutfelt's death and of plaintiff's claim as beneficiary, and as a part of such proof and claim, transmitted and surrendered to defendant, and defendant received, the original of said policy No. 3223099, including all supplements attached thereto. Defendant thereupon had the opportunity to read and should have read said policy, and as part of defendant's processing of said proof of death and claim, defendant, in 1945,

endorsed and executed on said policy, the following legend:

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income dated February 24, 1939 attached hereto.
>
> John Hancock Mutual Life Insurance Company
>
> By Elmer L. French, Secretary
>
> Dated at Boston, Mass., July 26, 1945."

And thereafter, in 1945, defendant returned said policy so endorsed to plaintiff.

12. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1945.

13. It is not true that defendant discovered its alleged mistake in 1954 but, on the contrary, it discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

14. Said Troutfelt died June 28, 1945. Thereafter, defendant made monthly payments to plaintiff to and including February 1, 1954. Since February 1, 1954 defendant has failed and refused to pay plaintiff any further monthly sum, and no further sum has been paid.

15. On or about May 13, 1954 defendant notified plaintiff in writing that it "does not consider it is liable for any further monthly payments under the family income provision", and that it would pay a

final payment of $4,993.59 but only upon surrender of the policy. Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt.

16. Said policy No. 3223099 contains upon its face the following words: "It is not necessary to employ any firm or person to collect the proceeds of this policy". Although the Court concludes, as a conclusion of law, that plaintiff is not entitled by reason thereof to recover any attorney's fees from defendant, the Court finds as a fact that it was necessary for plaintiff to employ an attorney to commence and prosecute the present action to collect the proceeds of the policy.

17. One of the terms of said contract was and is as follows:

> "This policy, except any supplementary provision hereof granting any benefit for total and permanent disability, or granting any additional insurance specifically against death caused by certain bodily injuries sustained through accidental means, shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premium, and except that if the Insured's age has been misstated, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age."

Said contract was in force during the lifetime of

the insured from its date of issue in 1939 to his death in 1945.

18. The allegations of paragraph 12 of the complaint are true.

From the foregoing facts the Court draws the following

Conclusions of Law

1. This Court has jurisdiction hereof.

2. Plaintiff is entitled to judgment against defendant in the sum of $8,000, together with interest at 7% per annum until the date of entry of judgment on

$50 from March 1, 1954,
$50 from April 1, 1954,
$50 from May 1, 1954,
$50 from June 1, 1954,
$50 from July 1, 1954,
$50 from August 1, 1954,
$50 from Sept. 1, 1954,
$50 from Oct. 1, 1954,
$50 from Nov. 1, 1954,
$50 from Dec. 1, 1954,
$50 from Jan. 1, 1955,
$50 from Feb. 1, 1955,
$50 from March 1, 1955,
$50 from April 1, 1955, and
$50 from May 1, 1955,

together with her costs of suit.

3. The rights and duties of the parties are as follows: Under the contract of life insurance en-

tered into between defendant and Martin E. Troutfelt in 1939, the terms of which are contained in defendant's policy No. 3223099 including all supplements thereto, defendant was obligated to pay to plaintiff $50 on the first day of each month after the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay her the further sum of $5,000, and upon defendant's refusal to perform said contract and its anticipatory breach thereof, plaintiff became entitled to recover said sums totaling $8,000 together with interest on delinquent monthly payments, and her costs of suit, and defendant is entitled to nothing by reason of its counterclaim, and, particularly, is not entitled to reformation of the contract or policy in any respect.

Let judgment be entered accordingly.

Dated: May....., 1955.

.....
United States District Judge.

Disapproved.

/s/ HENRY C. CLAUSEN, JR.,
Attorney for defendant.

Lodged May 24, 1955.

[Title of District Court and Cause.]

PROPOSED JUDGMENT

The above-entitled cause having been tried on February 9, 1955 before the Honorable Oliver J.

Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, and having made and filed herein its Findings of Fact and Conclusions of Law pursuant to F.R.C.P. Rule 52,

It Is Hereby Ordered, Adjudged and Decreed:

(1) The Court declares that defendant John Hancock Mutual Life Insurance Company and Martin E. Troutfelt entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099, including all supplements thereto, under which defendant obligated itself to pay to plaintiff Mary Troutfelt Cohen the sum of $50 per month on the first day of every month following the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay to plaintiff the additional sum of $5,000; and that by virtue of defendant's refusal and failure to pay any monthly payments after February 1, 1954, it committed an anticipatory breach of said contract.

(2) That plaintiff Mary Troutfelt Cohen do have and recover of and from defendant John Hancock Mutual Life Insurance Company, a corporation, the sum of $8,000 plus interest at the rate of 7% per annum to the date of entry of judgment on $50 from March 1, 1954, on $50 from April 1, 1954, on $50 from May 1, 1954, on $50 from June 1, 1954,

on $50 from July 1, 1954, on $50 from August 1, 1954, on $50 from September 1, 1954, on $50 from October 1, 1954, on $50 from November 1, 1954, on $50 from December 1, 1954, on $50 from January 1, 1955, on $50 from February 1, 1955, on $50 from March 1, 1955, on $50 from April 1, 1955, and on $50 from May 1, 1955, said interest totaling $....., together with plaintiff's costs of suit herein incurred to be taxed in the manner provided by law and the rules of the court, the entire judgment to bear interest from the date of entry of judgment at the rate of 7% per annum until paid.

(3) That defendant is entitled to no relief, and that it take nothing by reason of its counterclaim.

Dated this.....day of May, 1955.

.....

United States District Judge.

Disapproved.

/s/ HENRY C. CLAUSEN, JR.,
Attorney for Defendant.

Lodged May 24, 1955.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED MODIFICATIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Pursuant to Rule 21 of the General Rules of Practice, District Court of the United States, Northern District of California, defendant proposes the following amendments to the proposed Find-

ings of Fact and Conclusions of Law and Judgment submitted by plaintiff:

Findings of Fact

I.

Page 2, following paragraph 3, the following paragraph should be inserted:

"On February 24, 1939, after written application of the said Martin E. Troutfelt, defendant issued and delivered to him its policy numbered 3171136 for ordinary life insurance in the face amount of $5,000.00, maturing on death, with premiums payable for twenty years with supplementary provision for family income. Said provision required the insured to pay an additional premium for fifteen years, and provided for monthly payments to the beneficiary for a period not to exceed twenty years from the date of the policy, only in the event of the death of the insured within twenty years from the date of the policy."

Reason: To accord with the evidence and memorandum opinion.

II.

Page 2, paragraph 4, delete and substitute:

"Within a few months after the original policy was issued, said Martin Troutfelt made written application for conversion of the main policy to a fifteen year endowment policy and for a family income rider under which said insured would pay an additional premium for ten years, and his beneficiary would receive monthly payments for a period

not to exceed fifteen years from the date of the policy if the insured died within fifteen years from the date of the policy."

Reason: To accord with the evidence and memorandum opinion.

III.

Page 2, paragraph 5, delete and substitute:

"In issuing the new policy, numbered 3223099, defendant's scrivener and officers and agents made a clerical mistake in the family income rider. The rider actually issued provided for the payment of an additional premium for fifteen years (instead of ten), and for monthly benefits for a period not to exceed twenty years (instead of fifteen years) from the date of the policy if the insured died within twenty years from the date of the policy."

Reason: To accord with the evidence and memorandum opinion.

IV.

Page 3, paragraph 6, delete and substitute:

"From the date of issuance of said policy to and including the date of the insured's death the defendant charged the insured a premium that was correct for the rider applied for, but was ten dollars per year less than the correct premium for the rider as issued. The insured duly paid, and defendant accepted said premium, and said insured duly performed all the conditions on his part to be performed."

Reason: To accord with the evidence and memorandum opinion.

V.

Page 4, following paragraph 8, insert the following additional paragraph:

"The application for Policy No. 3223099 was made in New Mexico; premiums were paid from there; the said policy was delivered there; the contract was to be performed in New Mexico; and at all of said times, said insured was a resident of New Mexico."

Reason: To accord with the evidence and to fix the applicable state law.

VI.

Page 4, paragraph 9, delete the entire paragraph, and substitute:

"In the exercise of ordinary care or reasonable delegence, defendant could not have discovered its mistake in 1939."

Reason: The evidence is that defendant's only record of the policy applied for and the policy issued was the application of the insured; defendant did not, and does not customarily, retain copies of the rider actually issued; plaintiff never made claim to an additional five years family income until 1954; therefore defendant did not have any reasonable means of discovering the clerical mistake until after the death of the insured.

VII.

Page 4, paragraph 9, delete the entire paragraph.

Reason: To accord with the evidence and the memorandum opinion.

VIII.

Page 4, paragraph 13, delete the entire paragraph.

Reason: To accord with the evidence and the memorandum opinion.

IX.

Page 5, paragraph 15, delete "Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt."

Reason: The doctrine of anticipatory breach does not apply to actions for breach of an insurance contract payable in installments. See Brix vs. Peoples Mut. Life Ins. Co., 2 Cal. 2d. 446.

X.

Page 5, paragraph 16, delete the entire paragraph.

Reason: To accord with the memorandum opinion; furthermore it is an immaterial finding.

XI.

Page 5, paragraph 17, delete the entire paragraph.

Reason: Immateriality, and to accord with the memorandum opinion.

Conclusions of Law

I.

Page 6, following paragraph 1, add the following paragraph:

"Defendant's defense of mistake is barred by the provisions of Sec. 338(4) of the California Code of Civil Procedure."

II.

Page 6, paragraph 2, delete "in the sum of $8,000.00."

Reason: The doctrine of anticipatory breach does not apply to actions for breach of an insurance contract payable in installments. See Brix v. Peoples Mut. Life Ins. Co., 2 Cal., 2d. 446.

III.

Page 6, paragraph 3, delete the entire paragraph and substitute therefor the following:

"The rights and duties of the parties are as follows: Defendant is obligated to pay to plaintiff $50 on the first day of each month to and including February 1, 1959, and thereupon to pay her the further sum of $5,000.00, together with all accrued payments from February 1, 1954, interest thereon, and her costs of suit, and defendant is entitled to nothing by reason of its counterclaim, and, particularly, is not entitled to reformation of the contract or policy in any respect."

Reason: To accord with the findings of fact that defendant is barred from proving the true contract of the parties.

Judgment

I.

Page 1, paragraph (1), delete.

Reason: To accord with proposed modifications of conclusions of law.

II.

Page 2, paragraph (2), line 11, delete: "the sum

of $8,000" and insert: "The following principal sums."

Reason: To accord with the proposed modifications of conclusions of law.

Dated: May 31, 1955.

KEESLING & KEESLING,
WILLIAM H. KEESLING,
HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 31, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on February 9, 1955, before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, now makes and orders filed its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

1. At all times herein mentioned, and at the

time this action was commenced and removed to this Court, plaintiff Mary Troutfelt Cohen was and is a citizen of the State of New Mexico, and defendant John Hancock Mutual Life Insurance Company was and is a corporation duly incorporated, organized and existing under the laws of the State of Massachusetts and a citizen thereof and doing business in the State of California.

2. The matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs and is a civil action between citizens of different states.

3. At all times herein mentioned until his death, plaintiff was the wife of one Martin E. Troutfelt.

4. In 1939 defendant, as insurer, and said Troutfelt, as the insured, entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099 including the supplements attached thereto. Plaintiff was named beneficiary of said contract. By the terms of said contract, said Troutfelt was to pay premiums for 15 years from the effective date thereof or until his earlier death, in consideration of which defendant agreed to pay plaintiff the face amount of $5,000 in the event of Troutfelt's death.

5. As a part of said contract, and attached to said policy No. 3223099 were several supplements, one of which was styled "Supplementary Provision for Family Income." By the terms thereof said Troutfelt was to pay additional premiums for a period of 15 years from the effective date of the contract or until his earlier death, in consideration

of which defendant agreed to make monthly payments of $50 per month to plaintiff for a period beginning upon the first day of the month following the death of said insured and extending to and including February 1, 1959, and at the end of said period to pay to plaintiff the $5,000 face amount referred to in paragraph 4 above.

6. Said Troutfelt duly paid, and defendant accepted, all the premiums called for by said contract, and duly performed all the conditions on his part to be performed.

7. Defendant never informed said Troutfelt that said contract or any term or part thereof was a mistake or the result of a mistake, and said Troutfelt neither knew nor suspected, nor reasonably could or should have known or suspected, any mistake therein, and any mistakes in writing the premium payment term in the said "Supplementary Provision for Family Income" as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, or in any other respect, was not a mutual mistake but was the unilateral mistake of defendant alone.

8. After the said policy No. 3223099, including said Supplementary Provision for Family Income, was prepared by defendant's scrivener, and before its issuance and delivery to said Troutfelt, it was submitted to, examined by and executed by defendant's registrar acting on his own behalf and on behalf of its president and secretary. Said policy and supplementary provision were countersigned

by said registrar and said policy, including said supplementary provision, were endorsed and executed by defendant's secretary, thus:

> "This Policy is issued effective on the date of this endorsement as of its date of issue, in conversion of Policy No. 3171136, dated February 24, 1939, which is terminated as of the date of this endorsement, and in consideration of the surrender of the said Policy and the payment of Thirty Seven and 70/100 Dollars, for the cost of the said conversion.
>
> John Hancock Mutual Life Insurance Company
>
> By Charles Diman,
> Secretary
>
> Dated at Boston, Mass., July 27, 1939."

9. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1939.

10. Upon the death of said Troutfelt in 1945 plaintiff, his beneficiary, made and delivered to defendant due proof of said Troutfelt's death and of plaintiff's claim as beneficiary, and as a part of such proof and claim, transmitted and surrendered to defendant, and defendant received, the original of said policy No. 3223099, including all supplements attached thereto. Defendant thereupon had the opportunity to read and should have read said policy, and as part of defendant's processing of said proof of death and claim, defendant, in 1945,

endorsed and executed on said policy, the following legend:

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income dated February 24, 1939 attached hereto.
>
> John Hancock Mutual Life Insurance Company
>
> By Elmer L. French, Secretary
>
> Dated at Boston, Mass., July 26, 1945."

And thereafter, in 1945, defendant returned said policy so endorsed to plaintiff.

11. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1945.

12. It is not true that defendant discovered its alleged mistake in 1954 but, on the contrary, it discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

13. Said Troutfelt died June 28, 1945. Thereafter, defendant made monthly payments to plaintiff to and including February 1, 1954. Since February 1, 1954 defendant has failed and refused to pay plaintiff any further monthly sum, and no further sum has been paid.

14. On or about May 13, 1954, defendant notified plaintiff in writing that it "does not consider it is liable for any further monthly payments under the family income provision," and that it

would pay a final payment of $4,993.59 but only upon surrender of the policy. Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt.

15. Said contract was in force during the lifetime of the insured from its date of issue in 1939 to his death in 1945.

16. The allegations of paragraph 12 of the complaint are true.

From the foregoing facts the Court draws the following

Conclusions of Law

1. This Court has jurisdiction hereof.

2. Plaintiff is entitled to judgment against defendant in the sum of $8,000, together with interest at 7% per annum until the date of entry of judgment on

$50 from 3/1/54	$50 from 3/1/55	$50 from 3/1/56
$50 from 4/1/54	$50 from 4/1/55	$50 from 4/1/56
$50 from 5/1/54	$50 from 5/1/55	$50 from 5/1/56
$50 from 6/1/54	$50 from 6/1/55	$50 from 6/1/56
$50 from 7/1/54	$50 from 7/1/55	$50 from 7/1/56
$50 from 8/1/54	$50 from 8/1/55	$50 from 8/1/56
$50 from 9/1/54	$50 from 9/1/55	$50 from 9/1/56
$50 from 10/1/54	$50 from 10/1/55	$50 from 10/1/56
$50 from 11/1/54	$50 from 11/1/55	$50 from 11/1/56
$50 from 12/1/54	$50 from 12/1/55	$50 from 12/1/56
$50 from 1/1/55	$50 from 1/1/56	$50 from 1/1/57
$50 from 2/1/55	$50 from 2/1/56	$50 from 2/1/57
		and $50 from 3/1/57

together with her costs of suit.

3. The rights and duties of the parties are as follows: Under the contract of life insurance en-

tered into between defendant and Martin E. Troutfelt in 1939, the terms of which are contained in defendant's policy No. 3223099 including all supplements thereto, defendant was obligated to pay to plaintiff $50 on the first day of each month after the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay her the further sum of $5,000, and upon defendant's refusal to perform said contract and its anticipatory breach thereof, plaintiff became entitled to recover said sums totaling $8,000 together with interest on delinquent monthly payments, and her costs of suit, and defendant is entitled to nothing by reason of its counterclaim, and, particularly, is not entitled to reformation of the contract or policy in any respect.

Let judgment be entered accordingly.

Dated: March 20, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed March 20, 1957.

In The United States District Court, Northern District of California, Southern Division

No. 33864

MARY TROUTFELT COHEN, Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, Defendant.

JUDGMENT

The above-entitled cause having been tried on February 9, 1955 before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, and having made and filed herein its Findings of Fact and Conclusions of Law pursuant to F.R.C.P. Rule 52,

It Is Hereby Ordered, Adjudged and Decreed:

(1) The Court declares that defendant John Hancock Mutual Life Insurance Company and Martin E. Troutfelt entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099, including all supplements thereto, under which defendant obligated itself to pay to plaintiff Mary Troutfelt Cohen the sum of $50 per month on the first day of every

month following the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay to plaintiff the additional sum of $5,000; and that by virtue of defendant's refusal and failure to pay any monthly payments after February 1, 1954, it committed an anticipatory breach of said contract.

(2) That plaintiff Mary Troutfelt Cohen do have and recover of and from defendant John Hancock Mutual Life Insurance Company, a corporation, the sum of $8,000 plus interest at the rate of 7% per annum to the date of entry of judgment on $50 from March 1, 1954, on $50 from April 1, 1954, on $50 from May 1, 1954, on $50 from June 1, 1954, on $50 from July 1, 1954, on $50 from August 1, 1954, on $50 from September 1, 1954, on $50 from October 1, 1954, on $50 from November 1, 1954, on $50 from December 1, 1954, on $50 from January 1, 1955, on $50 from February 1, 1955, on $50 from March 1, 1955, on $50 from April 1, 1955, on $50 from May 1, 1955, on $50 from June 1, 1955, on $50 from July 1, 1955, on $50 from August 1, 1955, on $50 from September 1, 1955, on $50 from October 1, 1955, on $50 from November 1, 1955, on $50 from December 1, 1955, on $50 from January 1, 1956, on $50 from February 1, 1956, and on $50 from March 1, 1956, on $50 from April 1, 1956, on $50 from May 1, 1956, on $50 from June 1, 1956, on $50 from July 1, 1956, on $50 from August 1, 1956, on $50 from September 1, 1956, on $50 from October 1, 1956, on $50 from November 1, 1956, on $50 from December 1, 1956, on $50 from Janu-

ary 1, 1957, on $50 from February 1, 1957, and on $50 from March 1, 1957, said interest totaling $201.34, together with plaintiff's costs of suit herein incurred in the sum of $61.10, the entire judgment to bear interest from the date of entry of judgment at the rate of 7% per annum until paid.

(3) That defendant is entitled to no relief, and that it take nothing by reason of its counterclaim.

Dated this 20th day of March, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

Entered in Civil Docket 3/20/57.

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John Hancock Mutual Life Insurance Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 20, 1957.

Dated: March 27, 1957.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
KEESLING & KEESLING,
WILLIAM H. KEESLING,
/s/ By HENRY C. CLAUSEN,
Attorneys for Defendant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the Defendant, John Hancock Mutual Life Insurance Company, in the above-entitled action has appealed to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered against said Defendant in said action, in said District Court, in favor of the plaintiff in said action, on the 20th day of March, 1957 for the sum of $8,000 plus interest at the rate of 7% per annum to the date of entry of judgment on $50 from March 1, 1954, on $50 from April 1, 1954, on $50 from May 1, 1954, on $50 from June 1, 1954, on $50 from July 1, 1954, on $50 from August 1, 1954, on $50 from September 1, 1954, on $50 from October 1, 1954, on $50 from November 1, 1954, on $50 from December 1, 1954, on $50 from January 1, 1955, on $50 from February 1, 1955, on $50 from March 1, 1955, on $50 from April 1, 1955, on $50 from May 1, 1955, on $50 from June 1, 1955, on $50 from July 1, 1955, on $50 from August 1, 1955, on $50 from September 1, 1955, on $50 from October 1, 1955, on $50 from November 1, 1955, on $50 from December 1, 1955, on $50 from January 1, 1956, on $50 from February 1, 1956, and on $50 from March 1, 1956, on $50 from April 1, 1956, on $50 from May 1, 1956, on $50 from June 1, 1956, on $50 from July 1, 1956, on $50 from August 1, 1956, on $50 from September 1, 1956, on $50 from October 1, 1956, on $50 from

November 1, 1956, on $50 from December 1, 1956, on $50 from January 1, 1957, on $50 from February 1, 1957, and on $50 from March 1, 1957, said interest totaling $201.34, together with plaintiff's costs of suit herein incurred in the sum of $61.10, the entire judgment to bear interest from the date of entry of judgment at the rate of 7% per annum until paid.

Whereas, The Appellant is desirous of staying the execution of the said Judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, John Hancock Mutual Life Insurance Company, as Principal, and American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, as Surety, do hereby acknowledge themselves justly bound in the sum of Ten Thousand and No/100 ($10,000.00) Dollars jointly and severally, firmly by these presents, to the effect that if the said judgment so appealed from or any part thereof, be affirmed, or the appeal be dismissed, the Appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all such costs, interest and damages as the Appellate Court may adjudge and award.

And, Further, it is expressly understood and

agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter, may, upon notice to the American Surety Company of New York, of not less than ten (10) days proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

In Witness Whereof, the seal and signature of said Principal is hereto affixed and the corporate name of the said Surety is hereto affixed by its duly authorized officer at San Francisco, California, this 27th day of March, 1957.

JOHN HANCOCK LIFE MUTUAL INSURANCE COMPANY,

/s/ By HENRY C. CLAUSEN, JR.

[Seal] AMERICAN SURETY COMPANY OF NEW YORK,

/s/ By F. E. BUCKINGHAM,
Res. Vice President

Attest:

/s/ E. C. SCHOLZ,
Res. Asst. Secretary.

Approved: This 27th day of March, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

Notary's Certification Attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mary Troutfelt Cohen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 20, 1957 solely in respect of its failure to award to plaintiff any damages on account of defendant's breach of its written warranty that:

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff-Appellant Mary Troutfelt Cohen.

[Endorsed]: Filed April 8, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the plaintiff in the above-entitled action is about to appeal to the United States Court of Appeals for the Ninth Circuit, from a judgment entered in said action solely in respect of the failure of said judgment to award any damages to plaintiff on account of defendant's breach of the warranty set out in plaintiff's Notice of Appeal,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned American

Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the plaintiff that the said plaintiff will pay all costs which may be awarded against her on her appeal, or on a dismissal thereof, not exceeding the sum of Two Hnudred Fifty ($250.00) Dollars, to which it acknowledges itself bound.

In case of a breach of any condition hereof, the above-mentioned Court may, upon notice to said American Surety Company of New York, surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

In Witness Whereof, the corporate seal and name of said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 4th day of April, 1957.

AMERICAN SURETY COMPANY
OF NEW YORK,

/s/ By F. E. BUCKINGHAM,
Res. Vice President.

Attest:

/s/ E. C. SCHOLZ,
Res. Assistant Secretary.

Bond #35-570-270
Premium $10.00 Term

Notary's Certificate Attached.

Authority of Signers for Surety Attached.

[Endorsed]: Filed April 8, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD ON APPEAL

It appearing to the Court that, due to illness, the reporters' transcript of proceedings in the above case has been delayed in transcribing, it is

Ordered that the time for docketing the record on appeal in the United States Court of Appeals for the Ninth Circuit, be extended to June 24, 1957.

Dated: April 19, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the origi-

nals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant, Except there is no reporters' transcript of proceedings included for the reason it has not been filed in this office.

Excerpt from Docket Entries.

Petition for Removal with complaint and summons attached.

Bond on Removal.

Answer and Counterclaim of Defendant.

Request of Plaintiff for Admissions by Defendant.

Response of Defendant to Request for Admissions.

Interrogatories by Plaintiff to Defendant.

Reply of Plaintiff to Counterclaim of Defendant.

Answer of Defendant to Interrogatories by Plaintiff.

Statement of Admitted Facts by Plaintiff.

Memorandum Order of Court.

Order Permitting Amendment to Complaint.

Amendment to Complaint.

Stipulation re Answer.

Findings of Fact and Conclusions of Law Lodged by Plaintiff.

Judgment Lodged by Plaintiff.

Proposed Modifications to Findings, Conclusions and Judgment, filed by Defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal by Defendant.

Supersedeas Bond of Defendant.

Designation of Record on Appeal, by Defendant.

Notice of Appeal by Plaintiff.

Appeal Bond by Plaintiff.

Statement of Plaintiff Respecting Designation of Record on Appeal.

Order Extending Time to Docket Record on Appeal.

Plaintiff's Exhibit 1.

Defendant's Exhibit A.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 24th day of June, 1957.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes a supplemental record on appeal herein as designated by counsel:

Reporter's transcript of proceedings on settlement of findings, June 24, 1955.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of July, 1957.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

The United States District Court, Northern District of California, Southern Division

No. 33864

MARY TROUTFELT COHEN, Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INS. CO., a corp., Defendant.

REPORTER'S TRANSCRIPT
February 9, 1955

Before: Honorable Oliver J. Carter, Judge.

Appearances: For the Plaintiff: Messrs. Brobeck, Phlegar & Harrison, represented by Richard Haas, Esq. For Defendant: Messrs. Keesling & Keesling & Clausen, represented by Henry Clausen, Jr., Esquire, and Richard Burns, Esquire. [1]*

The Clerk: Cohen versus John Hancok Mutual Insurance Company for trial.

---

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

Mr. Haas: Ready for the Plaintiff, your Honor.

Mr. Clausen: Ready for the Defendant, your Honor.

The Court: All right. I gather from the pleadings this is an action on an insurance policy.

Mr. Haas: Correct.

The Court: Now, would you make a statement as to the nature of the case so that I can have the advice of counsel as to what the points in issue are.

Mr. Haas: Ready, your Honor.

The Court: I read the complaint briefly and the answer and counsel's claims, but I haven't had a chance to review all the admissions or requests for admissions and the answers thereto.

Mr. Haas: In that connection, your Honor, I should like to file at this time a statement prepared by me of the admitted facts.

The Court: All right.

Mr. Haas: I have served a copy on counsel. I think it may assist your Honor in seeing what the admitted facts are without having to thumb through all the papers in the file.

The Court: Well, thank you very much. [2]

Mr. Haas: This is an action on a written life insurance policy. The plaintiff is the widow and the beneficiary of the insured. The insured's name was George E. Troutfelt, T-r-o-u-t-f-e-l-t. The plaintiff was remarried and now her name is Cohen. The defendant is the insurance company.

The action was begun in the State courts and it is here by removal. In that connection it is an admit-

ted fact that the defendant is a Massachusetts corporation. It is alleged in the petition for removal that the plaintiff, Mrs. Cohen, is a citizen of New Mexico, and that is the fact and we so stipulate.

The dispute, your Honor, concerns the obligation of the insurance company under the rider to the policy, which is called a supplementary provision for family income. That is Exhibit 1 to the complaint. A photostatic copy of this supplementary provision is there attached. This is admitted to be the provision as written and delivered to the insured.

That supplementary provision reads in material part:

"That if after payment of the initial premiums under the policy and this supplementary provision and before default in the payment of any subsequent premiums, the death of the insured shall occur within 20 years from the date hereof—" and parenthetically, the date hereof is February 24, 1939, so that 20 years from that date is February 24th, 1958 or 9— [3] "the company, upon receipt of due proof on the company's prescribed forms of the death of the insured, will in lieu of immediate payment of the amount insured in one sum, which is the face amount of the policy or $5,000, pay to the beneficiary named in the policy—" that is the plaintiff—"if living, or to such other beneficiary as may be finally substituted under the conditions of the policy, on the first day of each policy month following the death of the insured, a monthly income

which shall consist of interest of so much per month plus an annuity of so much per month, the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of the issue of this provision."

Now that is wherein the dispute lies.

The insurance company—let me back up chronologically.

The policy was taken out in 1939. In 1945 the insured died. This is admitted. It is further admitted that the plaintiff then submitted due proof of claim; that she submitted the original policy to the life insurance company; that they stamped thereon and their secretary signed an endorsement which reads:

"Insured died June 28, 1945. Settlement in [4] accordance with supplementary provision for family income dated February 24, 1939, attached hereto. John Hancock Mutual Life Insurance Company, by Elmer L. French, Secretary, dated at Boston, Massachusetts, July 26, 1945."

The insurance company then began to pay monthly income to the widow. And at the expiration of 15 years from the date of issuance of the policy, to-wit, on the 1st of February, 1954, the insurance company made a payment of monthly income and notified the beneficiary that there would be no more monthly income.

The Court: When was that date paid, the income, to when?

Mr. Haas: They paid it to February 1st, 1954. Is that correct?

Mr. Clausen: That is correct.

The Court: And that's the 15 year?

Mr. Haas: That is 15 years. Your Honor will notice that the provision on its face says that they will pay for 20 years.

The Court: Yes.

Mr. Haas: The supplementary provision as written also provides "that the special premium for the annuity and the special premium for the total and permanent disability provision will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issuance of this provision." [5] That is as written, the insured was to pay a special extra premium for 15 years in return for which the insurance company was to pay monthly income to his widow for 20 years, each of those periods being calculated from the date of issuance of the policy.

Now, there is no claim in this case, as I understand it, that there is anything ambiguous or uncertain about the language of this provision. The insurance company's defense is that the insertion in this form of the figures "20 for payments and 15 for premium payments" was a scrivener's mistake.

The Court: On a clerical mistake?

Mr. Haas: Or a clerk, which is supposed to be mutual although I have a lot of trouble seeing how it to be mutual——

The Court: The allegation is that it is a mutual mistake of fact. But it is also alleged that an error was made by the scrivener?

Mr. Haas: Yes, sir.

The Court: The further contention, as I understand it, is that what they are offering to do is pay in accordance with the application paid by the insured——

Mr. Haas: That is correct.

The Court: Rather than in accordance with the policy which is their contention was a mistake.

Mr. Haas: Of course, it goes without saying that the fact that they made a mistake is irrelevant, unless they can show—and they have the burden of proof on the issue, not by [6] a mere preponderance of the evidence—but by clear and convincing evidence that this mistake was one which was shared by the insured; that is, he either knew or suspected that there was a mistake.

Of course, we deny that there was any mistake at all, the mistake by the scrivener or any mistake at all. And we also deny that there was any mistake which the insured either knew or suspected.

Now, would you mark this as Plaintiff's Exhibit 1 for identification?

The Court: All right. I presume that is the policy.

(Whereupon the original policy No. 3223099 was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Haas: I presume—although I don't know

that counsel will stipulate that this is the original policy?

Mr. Clausen: That's right. And it may be well to attach the original application.

Mr. Haas: I suggest that you put that in as part of your own case, counsel. Will you stipulate that Plaintiff's Exhibit 1 for identification is the policy on which the action was brought? We will offer Plaintiff's 1 in evidence.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 1. The original has the supplement on it?

Mr. Haas: Yes, your Honor.

(The original policy No. 3223099 previously marked Plaintiff's Exhibit No. 1 for identification was received in evidence.) [7]

Mr. Haas: If I may approach the bench?

The Court: Yes.

Mr. Haas: It is one of many pieces of paper attached hereto.

The Court: Yes, I see. Well, I just wanted to be sure that the Exhibit 1 included the supplement as well as the original policy.

Is it Policy 311 or 322——

Mr. Clausen: That is the subsequent policy.

The Court: It really is a substitute policy, isn't it, with the rider attached?

Mr. Haas: It is a policy, your Honor, which was issued in exchange for another policy.

The Court: That's right.

Mr. Haas: But the other policy is not the policy sued on. This is the policy sued on.

The Court: I understand that.

Mr. Hass: Now, I should like to read into evidence certain requests for admissions served by plaintiff on defendant and the responses thereto.

"Defendant's response to requests for admission No. 1: Defendant admits that Exhibit A attached to Plaintiff's Request for Admissions on file herein is a true copy of Defendant's Policy No. 3223099, together with all written [8] attachments thereto as executed, and delivered in 1939 by defendant to Martin Troutfelt and received by him."

We will offer that response in evidence.

The Court: It may be admitted into evidence. I don't think it has to be marked as an Exhibit.

Mr. Haas: No, your Honor. I just read it into the record so it will be in the record in evidence.

The Court: Yes.

(Whereupon the above mentioned document was agreed upon as being already in evidence.)

Mr. Haas: We will offer in evidence Defendant's response to request for admission number 2, which reads as follows:

"Defendant admits that upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary, (a) transmitted to defendant the original of said Exhibit A and defendant received the same; (b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary; (c) transmitted and surrendered the original of

said Exhibit A to defendant and a part of such proof and claim."

We will offer defendant's response No. 2 in evidence.

The Court: It may be admitted.

(Whereupon the foregoing document was admitted into evidence as described above.) [9]

Mr. Haas: Defendant's response to request for admission No. 3.

"Defendant admits that thereafter in 1945 it executed and endorsed upon the original of Exhibit A the legend set forth in Paragraph 5 of the Complaint herein and, so endorsed and returned it to Plaintiff."

We offer Defendant's Response No. 3 in Evidence.

The Court: It will be admitted.

(Whereupon the foregoing document was admitted into evidence as described hereinabove.)

Mr. Haas: Defendant's Response No. 4.

"Defendant admits that execution and endorsement of said legend occurred as part of processing said proof of death and claim."

We will offer Defendant's Response No. 4 in Evidence.

The Court: It may be admitted.

(Whereupon the foregoing Response was admitted into evidence as described hereinabove.)

Mr. Haas: Defendant's Response No. 6.

"Defendant admits that Martin E. Troutfelt was the insured and the defendant the insurer in the contract of insurance entered into between them.

We will offer Defendant's Response No. 6 in Evidence.

The Court: It is admitted. [10]

(Whereupon the foregoing Defendant's Response No. 6 was admitted into evidence as described hereinabove.)

Mr. Haas: Defendant's Response No. 7 reads:

"Defendant admits that said policy including the supplementary provisions and all applications attached thereto was written on forms prepared by defendant."

We will offer Defendant's Response No. 7 in Evidence.

The Court: It may be admitted.

(Whereupon the foregoing Defendant's Response No. 7 was admitted into evidence as described hereinabove.)

Mr. Haas: Now Request for Admission No. 8 propounded by Plaintiff to Defendant reads as follows:

"Admit that the written supplementary provisions for family income attached to said Exhibit A was wholly prepared by defendant and that Martin E. Troutfelt had no part in its preparation."

The Defendant's response to that request for admission reads as follows:

"Defendant admits that the written supplementary provision for family income attached to said Exhibit A was wholly prepared by defendant from the application therefore made by [11] Martin E. Troutfelt, dated July 11th, 1939 at Albuquerque, New Mexico."

We first move to strike from the response the words, "from the application therefore made by Martin E. Troutfelt dated July 11th, 1939, at Albuquerque, New Mexico," and offer the balance of Defendant's Response No. 8 in Evidence with those words stricken therefrom.

The Court: What is the position of the Defendant?

Mr. Clausen: Concurred, your Honor. I will agree to it.

Mr. Haas: Those words may go out?

The Court: They may be stricken then. And as stricken, the answer to the Request for Admission will be admitted into Evidence.

(Whereupon the foregoing Defendant's Response No. 8 was admitted into evidence as described hereinabove.)

Mr. Haas: Plaintiff's Request for Admission No. 9 reads as follows:

"That after receipt by Defendant from Martin E. Troutfelt of the two applications, one dated May 31st, 1939 and the other dated July 11th, 1939, copies of which are attached to said Exhibit A, no authorized representative of defendant orally informed Martin E. Troutfelt that the defendant bound and committed itself to issue a policy of insurance."

In response to this request the Defendant in its response, [12] Paragraph 9 states, "Defendant is without knowledge or information as to the facts on which it can truthfully admit or deny Plaintiff's

Request No. 9 inasmuch as the writing agent on the policy, George E. Troutfelt, left the service of the company on February 13th, 1946."

It is our position, your Honor, and we offer into Evidence as admitted, Plaintiff's request for Admission No. 9; that this answer is no answer at all; that is, it has not been denied and therefore stands admitted because the reason given for failure to admit or deny is wholly insufficient. That is, we offer Plaintiff's Request for Admission No. 9 in Evidence on the ground that it has been admitted as written by the Defendant's response thereto.

Mr. Clausen: To which I will object, your Honor. The question is so ambiguous, it calls for such a scope of knowledge upon the part of the company that it could be answered in no other way.

The Court: Now——

Mr. Clausen: "No authorized representative of defendant orally informed—". This company has thousands of employees.

The Court: Well, it may have thousands of employees, but the point is do you make any contention that there was any oral information given to him. That is what they want to know.

Mr. Haas: It would seem to me——

Mr. Clausen: He wants the company to admit that? [13]

Mr. Haas: That no authorized representative of Defendant orally informed Martin E. Troutfelt that the Defendant bound and committed itself to issue a policy of insurance. That is what we ask you to

admit to which you respond, "George Troutfelt, the writing agent, left the service of the company some time ago."

First, your Honor, I think that the position counsel now takes is one that ought to have been taken as an objection to the Request for Admission.

And secondly, we are not asking for the Defendant here to run out and talk to everybody employed by the Defendant for this reason, "That no person except the President, a Vice President, the Secretary, or an Assistant Secretary is authorized to waive, alter, modify, or change any of the conditions or the provisions of this policy including this provision, or of any indorsements thereon, or to waive for the future thereof, or to extend credit for the time or any payment or any premiums for any monies due to the company, or to bind it by making any statement or receiving at any time any notice of information not contained in the application for this policy."

So when we ask them to admit that no authorized representative of the Defendant orally informed Martin E. Troutfelt that the Defendant bound and commits itself, we are just asking them what did the corporation do as within the limits of the policy, within its agents' limits. [14]

Thirdly, there is no showing made that the Defendant has not, in fact, discussed this matter with George E. Troutfelt, the person—the writing agent who left the service of the company and in whose absence therefrom they state this "No knowledge or information" answer.

And it's our information that the Defendant's attorneys have in fact talked to Troutfelt. Now if that is the situation, I don't see how they can genuinely put in that "No knowledge or information," response to a request for admission.

That is, their reason is simply insufficient: "We can't answer because Troutfelt who wrote the policy isn't with us any more."

The Court: The thing is, I presume—and I am trying to gather the relative importance of this——

Mr. Clausen: I don't——

The Court: This provision, it's a negative approach. I mean, you are trying to——

Mr. Haas: I am trying to show, your Honor, and I think I can show from this response and the one that follows it, that the first thing that Troutfelt knew—the first indication of willingness on the part of the Defendant to insure him—was when he received the policy.

You see, we are going to get—we have a situation here in which the insured signed an application for a particular kind of policy. The company sends him a different kind of [15] policy.

Now the question is when he made that application did some authorized agent of the insurance company say, "That's your contract, you have got a contract right now."

How was the contract formed? That may be very important in this case. We simply seek to show that the first thing Troutfelt knew about any contract was when he received this piece of paper.

Mr. Clausen: May I have a word, your Honor?

The Court: Yes.

Mr. Clausen: The request not only asks for information of such a wide scope that the Defendant could not honestly answer question or ask for a legal opinion.

Mr. Hass: Why didn't you object to it then, counsel, when it was proposed and give us an opportunity to draft a Request for Admission that would have satisfied those objections?

Mr. Clausen: At the time this Response was made, the answer was true. I will state this to your Honor, that since the time that this Response was made, they finally found Troutfelt and talked to him, but he has no independent recollection concerning this matter at all.

The Court: Well——

Mr. Clausen: Your Honor——

The Court: Even assuming that the matter was —you were unable to answer it, or felt you were unable to answer it at [16] the particular time, is there any way of stipulating to the facts here?

Mr. Clausen: I will stipulate that none of these officers informed Martin E. Troutfelt that—I will stipulate that none of these authorized officers informed Martin Troutfelt the Defendant bound and committed itself to issue a policy of insurance. Do you accept the stipulation?

Mr. Haas: By these "authorized officers," you refer to the President, the Vice President, the Secretary, or Assistant Secretary?

Mr. Clausen: That is correct.

Mr. Haas: That stipulation is perfectly satisfactory.

The Court: All right.

Mr. Haas: We can pass on the next matter. We have the same problem, your Honor, in Plaintiff's Request No. 10 which reads as follows:

"That after receipt by Defendant of said two applications, the only written communication or advice by Defendant to said Martin E. Troutfelt that the Defendant insured or agreed to insure him consisted of delivering to him of the original of said Exhibit A."

May we have the same stipulation on that, counsel?

Mr. Clausen: Stipulate to what, counsel?

Mr. Haas: May we have a stipulation then, counsel, that [17] after receipt by Defendant of said two applications, the only written indication or advice by Defendant—and when I say "by Defendant," I mean made by the President, the Vice President, the Secretary or Assistant Sacretary—"to said Martin E. Troutfelt that the Defendant insured or agreed to insure him consisted of the delivery to him of the original of said Exhibit A."

That is the stipulation, Counsel.

The Court: To what time do you want this to go? I mean there was undoubtedly some communications when this matter was terminated, but that is prior to the death of Martin Troutfelt.

Mr. Haas: Oh, yes. We will come to that, your Honor.

The Court: Well, I mean your question is, it

was prior to his death, that was the only communication?

Mr. Haas: Yes, your Honor.

Mr. Clausen: Well, I won't stipulate to that, your Honor because we are going to offer in evidence the applications, the policies that were issued, and our response to it. There were various communications made by the company in sending back the policies, you see.

Mr. Haas: Well, let's limit it to a point in time, Counsel.

Mr. Clausen: And they don't know——

Mr. Haas: I am limiting it to this point of time: Between after receipt by the Defendant of said applications— [18] those are the applications dated May 31st, 1939, the other dated July 11th, 1939— after receipt of those applications and prior to the date when this policy was delivered, the only written communication or advice by defendant to Troutfelt that the Defendant insured or agreed to insure him consisted of delivery to him of the original of said Exhibit A. Do I make myself clear? I am just talking about the interval of time between the making of the applications and delivery of the policy.

Mr. Burns: The application you have reference to is the one that is dated May 11th, 1939, signed by Martin Troutfelt, and those total supplementary provisions for ten years and——

Mr. Haas: The only period of time I am asking now for in stipulation is the period between the receipt by the insurance company of these two

applications and the delivery to Martin Troutfelt of the policy.

Mr. Clausen: I can't stipulate to that because I don't know and the company doesn't know and says so.

Mr. Haas: I will offer in evidence——

Mr. Clausen: I don't see the materiality.

Mr. Haas: How the Defendant insurance company cannot know, your Honor, whether it made a written communication to this man between two dates just escapes me. They say Troutfelt wasn't there. But Troutfelt wasn't the insurance company. They know what letters they would have. They have got to know [19] what letters they wrote to this man.

The Court: Now what was the Request for Admission there that was—how was it answered then?

Mr. Haas: The Response to this, your Honor, is:

"Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny Request No. 10 for the reasons set forth in answer to Request No. 9, (which is Mr. Troutfelt left the service of the company on February 13th, 1946), except that in addition to the delivery to Martin E. Troutfelt of the original Exhibit A, Defendant issued its official receipt for premium for the term plan in the amount for which said Martin E. Troutfelt made application."

The Court: Well, the answer to your question is that they sent no other communications.

Mr. Haas: That is what they say. I want to move to strike beginning with the language,

"except," because it's simply self serving. The question is whether the only written communication or advice by said Defendant to Martin E. Troutfelt that Defendant insured or agreed to insure him; and they say, "We can't answer that except we sent him a receipt." Well, a receipt isn't a communication that they insured or agreed to insure him. It's simply a receipt as stated in the Response. [20]

But I don't see how they can say that they don't know whether they sent him a written communication between two dates.

The Court: I don't see either. If you limit to the official's names, it seems to me you ought to be able to answer the question.

Mr. Clausen: Since this is just a continuation of the prior question which asks for oral communications, I will stipulate to the same thing I stipulated with respect to No. 9 that for No. 10.

Mr. Haas: Well, I would like you to state for me, Counsel, what you believe it to be.

Mr. Clausen: That is my previous stipulation.

The Court: Restate it.

Mr. Clausen: That after receipt by Defendant of the two applications, one dated May 31st, 1939 and the other dated July 11th, 1939, the only written communication or advice by the authorized officers indicated upon the face of the policy was the delivery of the original of Exhibit A, and I will add on what the company wanted except for the delivery to him of premium receipts.

The Court: Do you have any objection to that?

Mr. Haas: No objection to that.

The Court: All right. The stipulation is accepted.

Mr. Haas: The same problem is presented by No. 11, [21] Plaintiff's Request for Admission No. 11—I should say the answer to that request——

"That Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny Plaintiff's Request No. 11 for the reasons set forth in answer to Request No. 9; i/e, that Troutfelt——"

The Court: What are you questioning in 11?

Mr. Haas: I just wanted to give the answer so you could see the same problem exists, your Honor. 11 reads as follows:

"That after receipt by Defendant of said two applications, Defendant never advised Martin E. Troutfelt that premiums under the family income provision would not have to be paid by him for more than ten years from February 24th, 1939, if he lived so long, in order to entitled his beneficiary to receive family income payments under the supplementary provisions for family income; or that it was not necessary for him to pay such premiums for fifteen years from February 24th, 1939, if he lived so long."

That is, we are asking whether an authorized officer of the company told or communicated to Martin Troutfelt that what he was supposed to do under the thing and what they were [22] supposed to do under it was something different than what was written on it.

Now here again the answer is, "They have no information or belief because George Troutfelt, the writing agent, left the service of the company."

But they have to know whether the President or somebody told Troutfelt that he didn't have to do what the policy stated.

The Court: You are talking about the insured, Troutfelt?

Mr. Haas: We are talking about the insured, Troutfelt. George Troutfelt is the writing agent.

The Court: I understand he must be some relative.

Mr. Haas: I think he is a brother of the insured.

The Court: All right.

Mr. Haas: The same stipulation, that none of the authorized officers after these applications were processed informed him that he had to pay for 15 years.

Mr. Clausen: That isn't what the Request asks, Counsel. The Request asks for an admission that after receipt by Defendant of the applications, the Defendant never advised Troutfelt that he would not have to pay for more than ten years, if he lived so long, in order to entitle his beneficiary to receive family income payments under the supplementary provisions or that it was not necessary for him to pay such premiums for fifteen years from February 24th, if he lived so [23] long.

The Court: He has agreed to the first part. He has already stipulated that they never told him that he would have to pay for 15 years.

Mr. Clausen: And besides, your Honor——

Mr. Haas: That isn't what I am asking for, your Honor.

Mr. Clausen: You see, the Request asks for a legal conclusion, anyhow.

Mr. Haas: Why?

Mr. Clausen: Well, that it was necessary for him to pay such premiums.

The Court: Well, the word "necessary"—you mean——

Mr. Clausen: Well, I will—what addition do you want, Counsel?

Mr. Haas: Suppose we go at it this way. Suppose—take Request for Admission No. 11 and have it understood between us that the word "Defendant" in here means the authorized officers of the Defendant listed on the face of the policy. I think that is our only point of difference, is that.

Mr. Clausen: All right, all right. I will agree to that.

Mr. Haas: With that stipulation, I offer No. 11 in evidence with the understanding that the word "Defendant" as used in the Request for Admission means the officers stated on the face of the policy, your Honor. [24]

The Court: The answer to that would be the Request in the question was so limited.

Mr. Clausen: Yes, your Honor.

The Court: All right.

Mr. Haas: All right.

(Whereupon the aforesaid Answer to Request for Admission No. 11 was received and admitted into Evidence as hereinabove.)

Mr. Haas: We will next offer in Evidence Defendant's Response No. 13 which reads as follows:

"Defendant admits that it never informed Martin E. Troutfelt that any portion of the original of said Exhibit A was a mistake or the result of a mistake."

We will offer that in evidence, your Honor.

The Court: It may be admitted.

(Whereupon the aforesaid Response No. 13 by Defendant was admitted into Evidence as hereinabove.)

Mr. Haas: Plaintiff's next offer in Evidence is Defendant's Response No. 14 which reads as follows:

"Defendant admits that not until May, 1954 did Defendant ever inform Plaintiff that any portion of the original Exhibit A was claimed to be a mistake or the result of a mistake." [25]

The Court: May what?

Mr. Haas: May, 1954, your Honor.

The Court: May, 1954.

Mr. Haas: May that be admitted in Evidence, your Honor?

The Court: It will be.

(Whereupon the aforesaid Response No. 14 by Defendant was admitted into Evidence as hereinabove stated.)

Mr. Haas: Plaintiff's Request for Admission No. 17 reads as follows:

"Defendant never informed Martin E. Troutfelt that the amount of premium to be paid for the supplementary provision for family income at-

tached to a 15 year endowment policy where the premium was payable for 15 years or until insured's death, if earlier, and the family income was payable until the termination of twenty years from the policy issuance date was different than if the income was payable for a period expiring 15 years from the policy issuance date and the premium was payable for ten years, or until insured's death, if earlier."

The Defendant's Response to that, which is in Paragraph 17 of their responses, is:

"Defendant admits Plaintiff's Request No. 17 because——" [26]

——and then some reason is given. We will ask that Plaintiff's Response No. 17—Plaintiff's Request No. 17 be offered in Evidence as admitted; that Defendant's Response No. 17 be admitted in Evidence—so far as it reads, Defendant admits Plaintiff's Request No. 17—and that all the words after the figure 17, beginning with the word "because" be stricken as non-responsive.

The Court: As far as I can see, the Answer is what counts. If you want to offer the reason for it and it's admissible, you can do it by appropriate testimony. Then the question of whether or not it is germane or material can be gone into and your offer will be accepted and that portion of the entry which you have read will be admitted.

The Clerk: Is that 17?

Mr. Haas: That is 17, that's right.

(Whereupon the aforesaid Response No. 17

by Defendant was admitted into Evidence as hereinabove stated.)

Mr. Haas: Plaintiff's Request No. 18 reads as follows:

"That Defendant never informed Martin E. Troutfelt that it did not or would not issue a supplementary provision for family income which would exceed the term of the policy to which it was attached."

To this request Defendant makes the same answer as it has made heretofore; that they can't answer that because George [27] Troutfelt is no longer with the company.

Counsel, may we have the same stipulation with respect to 18?

Mr. Clausen: Yes, you may.

Mr. Haas: Very well. I understand that it is stipulated that the Defendant—and by Defendant we mean the officers listed on the face of the policy —never informed Martin E. Troutfelt it did not or would not issue a supplementary provision for family income which would exceed the term of the policy to which it was attached; correct, Counsel?

Mr. Clausen: Yes.

Mr. Haas: I should like to offer in Evidence an admission of the Defendant contained in its answer to Interrogatories propounded by Plaintiff.

On Page 1 beginning on the next—the line next to the bottom which reads as follows:

"The Company never considered Policy No. 3223099 with the supplementary provisions for family income attached thereto to be representative of

the contract of insurance entered into between the company and the insured."

May that be admitted, your Honor?

The Court: What is your position on that?

Mr. Haas: This, I should say, your Honor, is in response to one of our interrogatories: [28]

"On what do you rely for your claim of mistake, a mutual mistake,"

and that is part of their answer thereto.

Mr. Clausen: Well, what about the rest of the answer?

Mr. Haas: I don't want to put in the rest of the answer, Counsel.

Mr. Clausen: I don't quite see, Counsel, where that is an admission.

Mr. Haas: If you are coming in 15 years after you write a policy and saying that there is a mistake and you admit that you never considered that the policy was the contract, I am going to ask you how can you show diligence in seeking to reform a contract when the period of limitations is three years after discovery. That's our position in the matter, your Honor. That is why I think that this statement is admissible.

The Court: Well, there is no question but what it is admissible. The question is should this be admitted at the same time. That is the only question.

Mr. Haas: Well, I should think, may it please the Court, that Counsel can put in anything he wants to. I don't have to read in the answers they

give us to our interrogatories, which is just a lot of—which is their case.

The Court: The only problem I see in it is whether or not the admission is a separable one. In other words, if it [29] is modified by other provisions, the modifications should go with it.

Mr. Haas: If he feels that it is in some way modified, I have no objection to having Counsel explaining his position or showing in what way it is modified by the way part of the answer——

Mr. Clausen: It is, in effect, a conclusion of the other factors relied upon by the company. And when it says, "The company never considered Policy—" and so forth—"to be the contract," it is stating the company's position on its intentions and is not an admission that they never looked at this particular piece of paper.

It's a conclusion of what the company intended when it issued its contract of insurance. All these other previous answers that you see go to this final conclusion.

The Court: Well, it is still a statement by the company. I don't know, as far as I am concerned, it can go into Evidence as read unless, I say, there is some further modification. If you have any—that is, if there is further statement there that should be added to it, you can go over that also.

Mr. Haas: Now that we have some of this material in evidence I should say that I think that's about our case, your Honor. Perhaps I can have a couple of minutes to talk about it?

The Court: Certainly. [30]

Mr. Haas: We have got a written policy of life insurance here, which is perfectly plain on its face. The Defendant takes the position that there is a mistake. As I say, we deny that.

We also have set up certain defenses. The first of which is the Statute of Limitations.

As your Honor is aware, the period in California, which is the law to be applied here, is three years from discovery of the facts. Now, we have an insurance policy——

The Court: Now, wait a minute. Has the Statute of Limitations been pleaded here?

Mr. Haas: Yes, your Honor. May I call your attention specifically to where it is pleaded?

The Court: Yes.

Mr. Haas: We pleaded it——

The Court: In the answer to the counter claim?

Mr. Haas: Yes, your Honor.

The Court: I see.

Mr. Haas: And in our answer—apparently they have set up not only by counter claim but by way of defense—and the California cases are perfectly clear—that when the plaintiff sues the defendant on a contract and the defendant sets up mistake, however he may plead it, that is by way of defense or by way of counter claim, the plaintiff is entitled to set up limitations. That is, he is entitled to state that the defendant [31] who wants to change the contract has not acted within a period.

The Court: That technically is a plea of the statute of limitations.

Mr. Haas: Well——

The Court: I mean whether it's technically that or thought you may have to testify, of course. I mean, you may be able to respond to the defense. But I don't think—do you have to affirmatively plead in the statute to claim that?

Mr. Haas: I don't know, your Honor, but we did.

The Court: You did, you did. I assume that all the allegations in the Answer are deemed denied except those irrelevant affirmative defense?

Mr. Haas: Yes, your Honor. But this is a counter claim in here to which we had to file a reply.

The Court: I understand that. You pleaded that.

Mr. Haas: The first authority, 5, 6 and 7, and 8 defenses go to the Statute of Limitations; that is, those defenses to the reply of the counter claim.

The Court: And your position is that the burden was upon the defendant to correct the mistake within three years, otherwise the Statute is run on there.

Mr. Haas: That is correct, your Honor. Our position is that one who wants to reform on the grounds of mistake has to plead and prove that with the exercise of reasonable diligence he couldn't have discovered his mistake any sooner than he did. [32]

Your Honor is familiar, of course, with the principle that knowledge and discovery are not convertible terms. If you are more than three years after the Statute, you have to go forward and say, "This

is what I did. This is why I didn't discover it. There is a mistake. And even though I am late, I simply couldn't discover this thing until now."

The Court: Now, may I ask you, do you have to prove that on your case?

Mr. Haas: I don't think so, your Honor. I think that when the pleading——

The Court: In other words, you have made your prima facie case?

Mr. Haas: I have made a prima facie case.

The Court: By introducing the policy.

Mr. Haas: They now come in and say, "We didn't discover this until 1954."

The Court: Well then, wouldn't it be well to state that? Aren't you anticipating as a matter of trial—in other words, you don't have to go any further. You can rest at the moment.

Mr. Haas: I can rest at the moment. I just wanted to let your Honor know what our whole case is about here.

The Court: Yes, for information.

Mr. Haas: Just so that your Honor knows what our position is in the matter before I sit down. [33]

The Court: Yes.

Mr. Haas: They have come in and they say, "We discover this 15 years after the policy was written by us. We discover it nine years after the policy is submitted to us for payment, and after our Secretary stamps on the policy," pay in accordance with the very provision that they now claim to be a mistake and it's our position that it is simply an insu-

perable burden. That as a matter of law they discovered when the policy was presented for payment and signed by their officer, they discovered the mistake, if any time, as a matter of law.

The Court: They did or should have.

Mr. Haas: According to the pleadings they deny that they read the policy at the time that it was submitted. But I don't see how that gets them anywhere when you are an insurance company and in the business of paying claims when they are presented and the policy is submitted to you, you can't get anywhere by saying "I didn't read the policy yet."

The Court: All right. I see your point.

Mr. Haas: We also, your Honor, urge the incontestability clause of the policy. There is a case in this Circuit, in the Ninth Circuit, the Richardson case, which just holds that when an insurance company—that an insurance company cannot seek to reform a policy for mistake when the policy contains an incontestable clause. This is specifically pleaded in the reply to the counter claim. [34]

The Court: All right.

Mr. Haas: Now, there is just one other thing I would like to say before I quit. That is this: The policy on this little flyleaf reads as follows: "It is not necessary to employ any firm or person to collect the proceeds of this policy."

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

It's our position, your Honor, that that is a warranty and representation and if the Court should

conclude the plaintiff is entitled to judgment here, that the Court should award a reasonable attorney's fee as the amount of damages, which the parties could proximately expect flow from a breach of that statement and warranty.

I just can't imagine what this is on the policy or what it's intended to be if it isn't that when you have a just claim that you will pay it and that you don't have to hire anybody to get your money.

And on that contractual basis, we will ask that if the Court render judgment for the Plaintiff, that the Court also award a reasonable attorney's fee.

The Court: All right. Mr. Clausen.

Mr. Clausen: I will make a short opening statement, lest you think that the Defendant is completely ignorant of the law and is coming into court with a case—no case as a [35] matter of law. I thought we had better clear away these legal issues first.

The application for the policy, premiums payable, delivery of the policy, all took place in New Mexico. Of course, your Honor will be required to apply New Mexico law.

Mr. Haas: Pardon me, Counsel. I don't mean to interrupt, but I do not agree or stipulate that the policy was delivered in New Mexico. I don't know where it was delivered.

Mr. Clausen: Well, that is part of our proof, your Honor. And this Richardson case that he made mention of is a lone case that stands against the majority rule practically universal throughout the United States, that a defensive mistake, as we raise

here, is not a contest within the meaning of the incontestable clause.

And, of course, we contend that under New Mexico law, will contend that the defensive mistake in a scrivener's error is not a contest within the meaning of the incontestable clause.

Besides which we contend that under California law the Richardson case—the rule of the Richardson case does not apply.

The second objection that the Plaintiff has raised is with respect to the Statute of Limitations. Now the law in California is the very opposite of what Counsel stated. The Defendant was bound in duty to reform this document. That it could [36] abide its time until sued upon it, you see, excuses it from performance as stated on one part of the contract. The Statute of Limitations does not apply to the defense of mistakes and fraud.

Now, out of extra caution, we also counter claim for reformation. And I anticipate that this case will be briefed and I have a case on this, holding that the Statute of Limitations does not apply in this type of a situation.

Now——

The Court: Well, your position is—I don't know what the answer to the question is—but is it your position that as a matter of defense as distinguished from a counter claim?

Mr. Clausen: That is correct, your Honor.

The Court: It doesn't apply. But in a counter claim you may be facing the statute, I don't know whether that is a situation—in other words, if the

action is one in reformation, that is distinct; but if the action is one and just whether you are liable on the policy, that is another thing.

Mr. Clausen: Now the important thing in this case is that this big piece of paper that counsel has been showing you is only a part of the contract. The application of the insured is the other part of the contract, both under the law and under the stipulations in the contract itself.

And we contend that when the policy was delivered to the insured, it stated right out there in the face of this document [37] that there was a mistake. And because of the sequence of events that developed through our witness here, it's a very understandable mistake because he applied for a converted policy within a few months of the original policy. The original policy was for a twenty payment life plan and the policy he secured was an endowment policy, and the defendant would never issue this type of a family income rider on this endowment policy. It stands right on the face of the instrument.

All the company—you can see he admitted all the facts. There is practically no dispute in the fact that all they want to do is perform under the contract. You see, we have to distinguish between the evidence of the contract, this policy, and the application.

Your Honor will be called upon to order enforcement of the contract, the agreement entered into by the parties. All that the company wants to do is pay what Martin Troutfelt bought. He bought the pol-

icy. He asked for a 15 year family income rider. He paid premiums for that. He didn't pay premiums for a 20 year plan. And that is all the company wants.

We will develop through our witness here the sequence of events and the fact that the company would never issue this kind of a rider with that kind of a policy. The fact that he applied for it, signed these documents, and the fact that you see the company does not keep a copy of the policy in its home [38] office, all that it has is this thing, these forms, application forms, in which they take their records, their accounting records. So that it makes no—the defendant in never admitting the insurance company informed him that he would have had to pay for an extra five years is telling the truth because at the time we say the 11 year came around he bought a plan where he had to pay premiums for ten years and got 15 years family income covering it.

If he had paid, say, in the 11th year the premium would have gone back to the home office. The records would have shown that he paid up fully because they don't have a copy of the policy.

The Court: Without in any way attempting to indicate a decision on the matter, what about the subsequent action of the company, the endorsement on the policy at the time that he started payments under the monthly plan?

Mr. Clausen: We admit that fact. They just didn't catch the error.

The Court: You admit it, but what about the binding effect of that action?

Mr. Clausen: That is a matter to be briefed. As you can see, the stamp, with a consideration, was their authority.

The Court: Except the premiums that he paid.

Mr. Clausen: Yes. And he had paid premiums, you can see, for only the 15 year coverage. [39]

The Court: Well, I mean—I see the point that you are making—but what I want to—I just for the purposes of information asked the question. I don't know what the legal effect of that is.

Mr. Clausen: Yes, your Honor.

The Court: But I presume Plaintiff takes the position that that is a binding agreement on the parties that if there was any error it was ratified and it was confirmed by the subsequent action.

Mr. Clausen: Well, that is a matter for the Plaintiff to prove, your Honor, ratification and knowledge.

The Court: Well, I mean he has proved that it was done. I think that the effect of that is something that—in other words, the inference that flows from that——

Mr. Clausen: There are conflicting inferences, your Honor.

The Court: Well, in any event, you are correct in that the matter has to be briefed because it is a question of law to be determined from already admitted facts.

Mr. Clausen: Yes.

The Court: Is there any fact upon which there is any conflict here, any basic fact so far?

Mr. Haas: Not that I know of, your Honor.

The Court: Well, if you have evidence that you want to offer insofar as to go to show the underlying mistake—— [40]

Mr. Clausen: That is right.

The Court: And there may be some dispute as to that. But that is a matter which you will offer into evidence.

Mr. Clausen: All right.

The Court: You may proceed, Mr. Clausen.

Mr. Clausen: Call Mr. Dennis Lawton.

The Court: I think we will just run right on through. About how long would you be?

Mr. Clausen: I should be finished shortly.

DENNIS J. LAWTON

a witness called by the Defendant, sworn.

The Clerk: State your full name for the Court's record.

The Witness: Dennis J. Lawton.

Direct Examination

Q. (By Mr. Clausen): Mr. Lawton, where do you reside?

A. 194 Appleton Avenue, San Francisco.

Q. And by whom are you employed?

A. John Hancock Mutual Life Insurance Company.

Mr. Haas: May it please the Court, we will object to any further questions being asked of this

(Testimony of Dennis J. Lawton.)

witness on the ground that prior to the trial of this case we submitted to the Defendant certain interrogatories, the first of which was upon what facts, events, and circumstances, did they rely [41] as tending to show that a mutual mistake of the Defendant and insured and by accident this policy was not the contract to the parties.

And then we asked that the Defendant rely upon the testimony of any person as showing or tending to show any of said facts, events or circumstances. The answer was yes.

Four: If the answer to interrogatory 3 is yes, give the name, address and occupation of any such person and summarize the expected testimony.

And in response to that interrogatory the Defendant answered, "Alfred Keef, Regional Supervisor, John Hancock Mutual Life Insurance Company, Franklin G. Bone, Section Head, John Hancock Mutual Life Insurance Company."

And then their expected testimony as summarized. Nowhere in the answers to these interrogatories did the Defendant advise us that this gentleman would be called as a witness or advise us of what his expected testimony would be. And to permit him now to testify is simply to subvert the discovery practice.

The Court: What is the situation there, Mr. Clausen?

Mr. Clausen: Your Honor, we have made arrangements for, or had expected the testimony of Mr. Alfred Keef. He was this gentleman's super-

(Testimony of Dennis J. Lawton.)

visor at the time of the application of processing. He was supposed to contact me. So a week ago I wired the company to find out where he was. They wired me [42] back that he had been transferred to Miami unknown to the Law Department.

Now I am sure that there will be no prejudice insofar as discovery is concerned. They have our entire file.

The Court: The summary of the testimony is going to be the same, in other words, Mr. Lawton——

Mr. Clausen: He is going to, of course, identify these instruments.

The Court: Well, the point is that the summary —is there going to be any deviation from the summary of the testimony that Mr. Keef would have given?

Mr. Clausen: I don't believe so, your Honor. You see, the answer to the interrogatory was very general, that it was a general summary.

Mr. Haas: Your Honor, if this witness is going to give the same testimony that this other gentleman would have given, I have no objection to his testimony, his testifying. I don't much care for the name of the witness. I do care to know when we ask what testimony there is going to be——

Mr. Clausen: I informed counsel as soon as I got to counsel——

The Court: That may be true. But even so, make the record clear. He says he has no objection if this man is going to take the place of Mr. Keef in giv-

(Testimony of Dennis J. Lawton.)

ing the testimony that is to be given in this case. Is that correct? [43]

Mr. Clausen: He has taken his place. I believe that he will shed further light not damaging to the —I mean further light on the processing of this claim because he happened to be the actual person who handled these applications unbeknownst to myself.

The Court: All right. We will overrule the objection. I will permit the witness to testify. He said he was employed by the John Hancock Mutual Life Insurance Company. He didn't say in what capacity.

Q. (By Mr. Clausen): In what capacity are you employed with the company?

A. Office Supervisor.

Q. And what duties does that entail?

A. General clerical clerk.

Mr. Haas: I didn't hear the witness' first answer.

The Court: Office Supervisor.

Q. (By the Court): When you say Office Supervisor, you mean here in San Francisco?

A. (By the Witness): Yes, your Honor. Yes, your Honor.

Q. (By the Court): For what region does that cover?

A. (By the Witness): For the Mission Office right here.

Q. (By the Court): What?

(Testimony of Dennis J. Lawton.)

A. (By the Witness): The Mission Office. It's at 4667 Mission.

Q. (By the Court): Yes, but what territory?

A. (By the Witness): Just half the City of San Francisco, your Honor.

The Court: Oh, I see.

Q. (By Mr. Clausen): And how long have you been with the company, Mr. Lawton?

A. Over 25 years.

Q. And calling your attention to the early part of the year 1939, you were then employed by the company? A. Yes, sir, I was.

Q. In what capacity, Mr. Lawton?

A. District cashier.

Q. And what duties did that entail?

A. They are exactly the same as the ones I perform today, except they changed the title.

Q. Would you elaborate?

A. The office clerical work supervising the processing of applications and receipts of money and correspondence with the home office, field force, and policy orders.

Q. Did you have occasion in the early part of the year 1939 to process the application of one Martin E. Troutfelt for insurance?

A. Well, it was processed in the office I was then employed at.

Q. Your office? A. Yes. [45]

Mr. Clausen: Now, your Honor, I have here this file, and these papers are pasted together. I

(Testimony of Dennis J. Lawton.)

can either offer them as one Exhibit and have him identify each document, or tear them apart, or whatever your Honor wishes.

The Court: I don't particularly care to have them torn apart, unless Mr. Haas does.

Mr. Clausen: Do you have any objection?

Mr. Haas: I haven't seen them yet.

The Court: All right. Then examine them.

Mr. Haas: May I have a moment, your Honor?

The Court: Yes, you may.

(Mr. Haas then examined the papers.)

Q. (By Mr. Clausen): Now, I will show you a document entitled "Application to the John Hancock Mutual Life Insurance Company at Boston, Massachusetts," and ask you to examine it, and ask you to identify that document.

Mr. Clausen: This is a book, you see, your Honor, to which all the other papers are attached.

Mr. Haas: What application is that, Counsel? Application for what—well, I think the document speaks for itself.

A. (By the Witness): This is a medical examination or application.

Q. (By Mr. Clausen): And for what number policy? A. 3171136.

The Court: Is that the original policy? [46]

Mr. Clausen: Yes, your Honor.

Q. I will show you the document attached to the previous document entitled, "Part A of Application," and ask you to identify it.

(Testimony of Dennis J. Lawton.)

A. This is the application for policy 3171136 by the applicant, the proposed insured.

Q. And what type of policy did the insured ask for?

Mr. Haas: I will object to that question on the ground that the application speaks for itself.

Mr. Clausen: The witness is going to explain these terms to your Honor.

The Court: I will overrule the objection on that point. The document does speak for itself, but it does require an interpretation.

A. (By the Witness): A twenty year payment life policy.

Q. (By Mr. Clausen): And what is a twenty year payment life policy?

A. It's a life policy with premium payments becoming due through a period of twenty years. In other words, at the end of twenty years, the insured would not have to pay further premiums, and he would be insured for the remainder of his life.

Q. And when does it become payable?

A. The proceeds of the policy?

Q. Yes. [47]

Mr. Haas: I will object to this whole line of questioning, your Honor. If there is a contract here, let your Honor decide what a twenty year policy is and when its payments—these are all questions of law. If he has got a policy, let him put it in. Your Honor knows what the insurance policy says and what it means.

The Court: I presume it speaks for itself. What

(Testimony of Dennis J. Lawton.)

do you want to do with this witness in this respect?

Mr. Clausen: Your Honor, you see the point that the company has made is that it would be inconceivable that they would ever have a family income rider on an endowment policy of the terms that were put in this particular policy. I am just going to contrast, you see, the different kinds of contracts that this person actually planned for.

The Court: Well, Mr. Haas said that you should produce the contracts and that they'd speak for themselves. You can argue that. You don't have to prove it by this witness. Do you want to put that file in? I presume that is a file of this man, Troutfelt?

Mr. Clausen: Yes, your Honor.

The Court: That you have there, an office file.

Mr. Clausen: Well, I will offer the entire file and if Counsel has no objection——

Mr. Haas: I object to it on the ground that there has been no foundation laid. [48]

Mr. Clausen: I am trying to lay the foundation, your Honor.

The Court: Well, in what way has the foundation been laid?

Mr. Haas: We have a mass of documents here. The witness hasn't testified that Troutfelt signed any of these papers, or that any doctor signed any of these papers. As far as I know, he is just telling us that that is an application for policy number 3171136.

Q. (By the Court): Well, Mr. Lawton, that is

(Testimony of Dennis J. Lawton.)

a file that is kept by the John Hancock Mutual Life Insurance Company in the office of which you are now the supervisor, and in which you worked in 1939, which is kept in the regular course of business?

A. (By the Witness): No, your Honor. This is a file that would be maintained at our home office at Boston, Massachusetts.

Q. (By the Court): Well, it is a file though, a regular file that is maintained in the regular course of business, is that correct?

A. (By the Witness): Yes, sir. It's the source documents for the policies, that is, the original applications.

Q. (By the Court): And did those documents clear through this office before they went to the home office?

A. (By the Witness): Yes, your Honor. [49]

Q. (By the Court): And that is the office at which you work?

A. (By the Witness): Yes, at that time. It was at 681 Market Street.

The Court: All right.

Mr. Clausen: I now offer the file in evidence.

Mr. Haas: I still object on the ground that there has been no foundation laid.

The Court: Well, it is a business record of the company. I am not going to be over technical about it. I will admit it into evidence as Defendant's Exhibit A.

The whole file?

(Testimony of Dennis J. Lawton.)

Mr. Clausen: Yes. I am going to include now the——

The Court: You had better make that a special exhibit now, what you are doing there, if you are going to add additional papers if you want to. I mean, all you need to do is identify it.

Mr. Clausen: These were the original applications.

The Court: Are they part of that file?

Mr. Clausen: They are the originals of Plaintiff's 1, you see.

The Court: I understand that.

Mr. Clausen: And they were part of that file.

The Court: If they are part of that file, they should be annexed to the bottom in the place that they belong. Attach them to it then in their appropriate place or any other place. [50]

Q. (By the Court): So that there will be no misunderstanding about it, those originals are the applications, are a part of the same file, are they, Mr. Lawton?

A. (By the Witness): The last two documents, your Honor, yes.

The Court: Well, I didn't see them. Show them to the witness, will you please?

Q. (By Mr. Clausen): These two documents attached here, Application for Supplementary Rider, dated May 7th—July 11th, 1939, are part of that file, is that not correct? A. Yes.

The Court: All right then. The documents with

(Testimony of Dennis J. Lawton.)

all of the papers will be admitted as Defendant's Exhibit A.

(Whereupon the foregoing office file and attached documents were admitted into evidence as Defendant's Exhibit A.)

Q. (By Mr. Clausen): Now, was a policy of twenty payment life insurance issued by the Defendant to Martin Troutfelt after the application was transferred to your office? A. Yes, sir.

Q. And did it have attached to it a family income rider?

A. Yes, sir. It provided for a family supplementary provision.

Q. And what term was that, Mr. Lawton? [51]

A. The period of the rider, it was twenty years with premiums payable for fifteen.

Q. And what was the premium charged for the family income rider?

Q. (By the Court): Do you need the papers?

A. (By the Witness): I can't recall. It would be around, over twelve—it would be around $12.00 per thousand.

Q. (By Mr. Clausen): $12.00 a thousand, you don't know exactly?

A. No, I don't know exactly.

Q. I will now show you a book entitled, "Premium Rates," dated July, 1938, and ask you to describe that to his Honor, what is it?

A. It's a rate book used by our salesmen. It furnishes the plans and premiums for the policy to be issued.

(Testimony of Dennis J. Lawton.)

Q. And that is issued by the Defendant, isn't it?

A. Yes.

Q. For the advice of the agents in computing premiums? A. Right.

Q. Now can you look in that book and tell me whether policy number—can you look in that book and tell me what the premium charged for the family rider of policy number 3—the original policy 3171136 was?

A. What is the age on that, sir?

Q. Thirty-six. [52]

A. For the original policy?

Q. Yes.

A. It would be $10.59 per thousand, five times.

Q. Make a monthly total of what? $52.95?

A. $52.95.

Q. And was that payable yearly?

A. That would be an annual premium, yes.

Q. Now since you have——

Q. (By the Court): That is a $5000.00 policy?

A. (By the Witness): Yes, sir.

Q. (By Mr. Clausen): Well, you have your rate book in front of you. What is the premium chargeable for a 15 year family income provision with a 10 year premium?

Mr. Haas: Attached to what kind of policy, Counsel?

Mr. Clausen: What?

Mr. Haas: Attached to what kind of policy?

A. (By the Witness): It wouldn't matter. It's

(Testimony of Dennis J. Lawton.)

a supplementary provision. It would be the same on any type of policy, premium.

Q. (By Mr. Clausen): What would be the premium chargeable?

A. It would be $8.64 per thousand.

Q. And what would that be for $5000.00?

A. $43.20, if my application is correct.

Mr. Clausen: I am going to offer this rate book in evidence, your Honor. [53]

The Court: Do you need the rate book with the testimony?

Mr. Clausen: Well, all right. I will withdraw the offer.

The Court: Unless Mr. Haas wants it in for his own recollection. I don't need it. As a matter of fact, I doubt my ability to read the rate book accurately. I would have to rely on this man's testimony, who is an expert in his field.

Q. (By Mr. Clausen): Now you say that a policy number 3171136 was issued and delivered to the insured, Mr. Martin E. Troutfelt?

A. Yes, sir.

Q. Now did it have on the face of the policy these premiums charged for the family income rider?

A. Yes, it would have it on the file in back.

Q. On the front of the policy, is that not correct? A. Correct.

The Court: He called it the file in back.

The Witness: Well, your Honor, we fold it up

(Testimony of Dennis J. Lawton.)

and put it into a glassene envelope so that the policy—you can see the premiums.

The Court: Yes, in the window it shows the amount of premiums to be paid.

The Witness: Yes, sir.

The Court: And you have shown them all in the original policy, that is, Plaintiff's Exhibit 1, that is right there, isn't it? [54]

Mr. Clausen: Yes, your Honor.

The Court: It's in evidence already.

Mr. Clausen: Well, that——

The Court: Isn't that the policy there? Don't we have the original policy?

Mr. Burns: No, your Honor. That is the subsequent policy. The original policy has not been offered.

The Court: Oh, I see. That is the substituted or exchanged policy. But it has the file in back on it, does it?

Mr. Clausen: Yes, your Honor.

The Court: And that shows the premium on it?

Mr. Clausen: Yes, your Honor.

Q. Now, subsequent to the issuance and delivery of policy number 3171136, did Martin E. Troutfelt make application for conversion of that policy?

A. Yes. He decided to change the plan.

Q. And was that application sent to your office from Albuquerque, New Mexico?

A. The request was received at our office.

Q. And then what did you do, Mr. Lawton?

(Testimony of Dennis J. Lawton.)

A. Well, our office force prepared a conversion form. It's a 128R.

Q. Do we have such a form in this Defendant's A?

A. Yes. There must be one there, sir. [55]

Q. All right. And then what did you do, Mr. Lawton?

A. We forwarded it to the insured for completion.

Q. And was that done in this case?

A. Yes, sir. There was a converted policy.

Q. Pardon?

A. Yes, yes, sir. There was a new policy issued on the original application.

Q. Yes, I know but——

The Court: Well, will you let him look at the file and point out the document?

Mr. Clausen: Yes. I am trying to find it myself.

The Witness: Here is the application for exchange.

Q. (By Mr. Clausen): All right. Did the insured ask that the family income rider be changed?

Mr. Haas: Are you talking about orally now, counsel, or in writing, or by this application?

Q. (By Mr. Clausen): Was that application asked for, or for a change in the rider?

Mr. Haas: I object on the grounds that the application speaks for itself. What it means, what it says, is a question of law.

The Court: Well, the application speaks for itself. Now if you want some phase of it interpreted

(Testimony of Dennis J. Lawton.)

by reason of special language because of this man's knowledge, you can. But you don't have to prove it by this witness because it's on the document [56] itself.

Mr. Clausen: Yes, your Honor.

The Court: Unless it's preliminary to some—if it is preliminary, I will permit him to go into it as a basis for whatever sections you desire.

Q. (By Mr. Clausen): Will you answer the question?

A. Yes. An application for conversion with a family supplementary provision was requested by him.

Q. And what did you do with that application, Mr. Lawton?

A. This application on its completion together with the additional forms were submitted with the policy to our home office.

Q. With the old policy?

A. The old policy, yes.

Q. And then did the home office communicate with you thereafter? After receipt of those documents?

A. Yes, they did. We have memorandums on their forms.

Q. The memoranda on that file, which you pointed out to counsel and to the judge.

Q. (By the Court): What does the memorandum say?

A. (By the Witness): Letter date of "Letter to and from."

(Testimony of Dennis J. Lawton.)

"To," means to the District and "From" is to the home office sundry district. That is pencil memorandum 62339 thereon to the District which was the San Francisco one, was the title of the district, Re: family income provisions. [57]

Q. (By Mr. Clausen): Yes. Now did the company in response issue and deliver to you the policy sued upon in this case after receipt of that application?

A. No, they didn't. There was some further correspondence and additional forms required.

Q. And do you remember what the reason was for requiring additional forms?

A. Well, the original application for conversion did not specify a family income provision desired. It said, "15 year endowment, F. I. provision" leaving the coverage open.

Q. (By the Court): What do you mean by that? I don't quite follow you on that.

A. (By the Witness): The supplementary provisions, family income provision, is issued for a stated period of time, your Honor.

Q. (By the Court): Yes. Now what do you say that the correspondence was about?

A. (By the Witness): And the correspondence —when family—is the term of the policy, say, 15 years, but not the term of the family income provisions.

Q. (By the Court): You mean was that mailed back to the district office to determine that fact?

A. (By the Witness): That had to be deter-

(Testimony of Dennis J. Lawton.)

mined before they could convert the policy, your Honor.

Q. (By the Court): All right. Then what happened? [58]

Q. (By Mr. Clausen): Then what happened, Mr. Lawton?

A. Well, the form was prepared to cover that phase of it.

Q. (By the Court): You say "was prepared," where was it prepared? And who prepared it, if you know?

A. (By the Witness): Well, it would have been prepared at the home office or the district office on direction of the home office with the data furnished by the home office.

Q. (By the Court): The insured or the applicant had nothing to do with it other than by whatever information was on the application that you had on file?

A. (By the Witness): It would be transmitted to him for his approval and signature, sir.

Q. (By the Court): Well, was it in this case?

A. (By the Witness): Yes; his signature is on here.

Mr. Haas: What document are you talking about?

Mr. Clausen: We are now talking about the application for the family income rider attached to policy 3223099.

Mr. Haas: Is that it?

Mr. Clausen: That is it.

(Testimony of Dennis J. Lawton.)

Q. (By the Court): Are you saying it was made out in the home office or the district office and forwarded to the applicant there?

A. (By the Witness): For completion and signature, acceptance. The form gives the applicant's name, Martin E. Troutfelt, and typed in. And it states a request on it for the premiums to [59] be paid for ten years, amount of premium $44.30.

Q. (By Mr. Clausen): Now were the blanks filled in on that application before—before the application was sent to the insured for his signature?

A. Well, the typewriting, the name and the questions 11 to 14, were inserted before it was forwarded to the applicant for completion.

Q. (By the Court): The questions 11 and 14, you say?

A. (By the Witness): Yes, sir.

Q. (By the Court): What are the questions 11 and 14?

A. (By the Witness): Well, question 11, sir, is term of supplementary provision.

Q. (By the Court): Now, that was filled in by the company before it went to him?

A. (By the Witness): Yes, sir.

Q. (By the Court): And then what is 14?

A. (By the Witness): 14 is premiums to be paid for number of years.

Q. (By the Court): And that was filled in by the company at 15 years?

A. (By the Witness): Ten years.

The Court: Ten years.

(Testimony of Dennis J. Lawton.)

The Witness: And the amount of annual premium.

Q. (By the Court): And the amount, the forty four dollars and some odd cents, whatever it is there, filled in also; and [60] that went to him in that form, is that correct?

A. (By the Witness): Yes, your Honor.

The Court: All right.

Q. (By Mr. Clausen): And then the subsequent —that is, subsequently did you receive that application by return mail from the insured?

A. Yes. It was subsequently received in our office.

Q. And then what did you do with it?

A. Well, I would normally refer it to the home office under cover of a letter and reply to their original request for this form.

Q. And subsequently then the company issued the policy sued upon in this case?

A. Correct.

Q. Now where was the policy delivered?

A. Well, on this specific instance to clear we have—I presume he lived in New Mexico—it would be mailed to him because it was an office transaction. In that it was a new policy, it would be given to the writing agent for delivery.

Q. And from where were the premiums paid?

A. From Albuquerque, New Mexico.

Q. (By the Court): Does this San Francisco office receive and process applications that came from New Mexico, applications of this kind?

(Testimony of Dennis J. Lawton.)

A. (By the Witness): No. That was a very rare [61] occurrence, sir. You see, this man was in San Francisco when he made his original application, although his residence was in New Mexico.

Q. (By Mr. Clausen): Who was the agent in this case, Mr. Lawton?

A. George Troutfelt.

Q. And was he a relation to the insured?

Mr. Haas: I object on the grounds that it is irrelevant.

The Court: Well, I will overrule it. I don't know whether it's relevant.

A. (By the Witness): I believe he was.

Q. (By Mr. Clausen): And does your company have an office in Albuquerque?

A. No, I don't think so.

Q. And is it not correct that any application made from Albuquerque would go through the San Francisco office?

A. Well, any changes or requests for modifications of policies after they are issued, they are handled regardless whether they are in Europe or Asia because of state of residence.

Q. Now, it's the company's position that the company would never have issued a twenty year family income rider on a 15 year endowment policy. Would you please explain to his Honor why the company would not do so?

Mr. Haas: I will object to that question on the ground first that we haven't established that to be a fact, and second, [62] this witness hasn't been

(Testimony of Dennis J. Lawton.)

qualified to testify as to what the company would do. He is a district officer out here. He isn't, as I understand it, the man to decide where the risks will be taken. I don't know whether just at the moment, know whether the question even as it stands would be permissible to a man of higher authority than this.

Mr. Clausen: I will withdraw the question.

Q. Have you processed claims? I mean, have you processed modifications of policies and the issuance of policies which contain family income riders? A. Yes.

Q. And about how many have you processed?

A. Oh, several hundred, I suppose.

Q. And over how long a period of time?

A. Let's see, since approximately—since 1935; almost twenty years.

Q. Now, has the Defendant ever issued a 20 year family income rider on a 15 year endowment policy?

Mr. Haas: I object to the question on the grounds that it's perfectly obvious that the witness couldn't know the answer. He is in San Francisco. He has handled several hundred policies. I suppose, just as the Court knows, that John Hancock has several million policies. How can this man testify as to whether John Hancock has ever issued a policy of a certain kind? [63]

Mr. Clausen: It goes to the weight, your Honor.

The Court: Yes, I will overrule it.

Mr. Haas: The fact is that they have issued

(Testimony of Dennis J. Lawton.)

such a policy and there is one admitted in evidence.

The Court: Insofar as he knows, I will permit him to testify.

Q. (By the Court): Has that ever occurred?

A. (By the Witness): No, your Honor. Supplementary riders cannot be issued for a period longer than the policy, original policy period to which——

Q. (By the Court): You mean the remainder of the original period. In other words, in this case, as I understand it—now, I want to be sure I understand it—the original policy was issued in '39, is that correct?

Mr. Clausen: Yes, your Honor, in February of '39.

The Court: And then the subsequent policy, that was a 20 pay life policy?

Mr. Clausen: 20 pay life policy with a twenty year family income rider. And the second policy, the first application for conversion made in May——

The Court: Of 1939.

Mr. Clausen: Of 1939 and found to be defective with respect to the family income rider, so that an application in July for a 15 year income rider was made by the insured——

Mr. Burns: Which the company directed to be made on that term. [64]

Mr. Clausen: And the application for conversion, as he has testified, was defective in not putting down the terms.

(Testimony of Dennis J. Lawton.)

The Court: Well, the witness has given an answer. Do you have any further questions?

Q. (By Mr. Clausen): Does the company keep a copy of the policy itself after issuance to an insured, to your knowledge? A. No, they don't.

Q. They do not?

A. They retain the original applications.

Q. Do you know the company accounting practice in the home office with respect to computing the periods in which premiums must be paid?

A. Yes. It's the term——

Q. And what is that practice?

A. It's determined from the original applications for the policy.

The Court: Mr. Clausen and Mr. Haas, so that you will understand this, I assume that practice of the insurance companies, including this one, is that all of their policy writers, except that which might be some special matter, are issued on forms. And while they may not keep a duplicate copy of the policy that is issued, it's a policy that's on a form and filled out in a certain manner, isn't that it?

Mr. Clausen: Yes, your Honor. You see, they [65] don't keep a duplicate is what I mean. They don't keep a duplicate. They have forms, of course, specimens of the particular type of policy.

Q. (By the Court): All right. Do they maintain or keep any record that would show how the blanks on a particular policy, blank spaces, how they are filled in or anything that is typewritten

(Testimony of Dennis J. Lawton.)
or printed other than the form itself; do they keep any duplicate of that?

A. (By the Witness): They retain the original form, your Honor and photostat it and attach the photostat of the copies to the policy that is issued. They retain the original applications.

Q. (By the Court): Well, they retain the original applications. But when a policy—take a policy form, and it's then filled out, certain blank spaces, or the policy is printed with certain standard provisions in it, and then in certain spaces are typewritten certain information. Now, there is a carbon kept of that or a duplicate kept of that which is typewritten into the spaces such as amounts of money, names, period of time.

A. (By the Witness): No. That is taken from another department onto the records. The form number on the policy that is issued is stamped on the original application, and the policy is typed from the information on the application. It is supposed to be checked and is then checked by the person who approves it.

The Court: All right.

Q. (By Mr. Clausen): It is the Defendant's practice, to your knowledge, Mr. Lawton, to issue a policy for supplementary provisions for family income in strict conformance with the applications therefor?

A. Yes, provided they accept the risk.

Q. What would have been the practice of the

(Testimony of Dennis J. Lawton.)

company had the insured in this case paid a premium on the 11th year?

Mr. Haas: I will object to that question on the ground it is so remote and hypothetical. The man died six years after the policy was issued. Now counsel wants this witness to tell us what the home office would have done if he had lived five years more and paid another premium. I think that is so remote that we can't possibly know the answer to that question.

Mr. Clausen: I am asking for the practice. I will make it a supposition. Suppose——

Mr. Haas: You mean there is a practice of writing these policies and doing something with them?

The Court: I don't think you want to know—what are you going to do?

Mr. Clausen: It is a hypothetical question, what would happen in a hypothetical case.

The Court: All right. I will permit you to do it. I don't know—— [67]

Q. (By Mr. Clausen): All right. Suppose you had a 15 year family income rider, premiums payable for 10 years. Suppose the insured, by mistake, paid a premium in the 11th year. What is the company's practice regarding the keeping or returning of the premium?

A. Well, he would be billed for his correct premium.

Q. Now, you say he is billed for his correct premium?

(Testimony of Dennis J. Lawton.)

A. Before it's due, about a month before it would be due.

Q. Now let's assume that he through excess generosity paid the premium before the bill is received by him, what is the company's practice?

A. Well, it's quite possible if it came to our office the girl would send it through to the home office as it was paid. But then the home office would send their statement on it and issue a receipt on it and ask us to refund the overpayment to the insured with the receipt by form of a check.

Q. And has that happened in the past?

A. Yes, frequent errors occur on premiums and the amount.

Mr. Clausen: All right. I have no further questions. I wonder if I could have a five minute recess?

The Court: Well, you may. I have a grand jury coming in very soon. I think perhaps then we should recess the matter over until this afternoon, if that is the situation. How long will you be? [68]

Mr. Haas: I have very little. There are just a couple of points I would like to clear up with this witness.

The Court: Do you have any further questions?

Mr. Clausen: Of this witness?

The Court: Do you have any other witnesses?

Mr. Clausen: No other witnesses, your Honor.

The Court: Well, I will declare a brief recess. But if the Grand Jury adjourns we'll just have to——

(Testimony of Dennis J. Lawton.)

Mr. Clausen: I am ready to go in five minutes again, your Honor.

The Court: We will take a brief recess.

(Recess.)

The Court: Are you ready to proceed now?

Mr. Haas: Yes, your Honor.

The Court: Mr. Lawton, would you step forward and take the witness stand. I may have a phone call that I will have to take. As soon as it occurs, I will take a recess in this matter, if it's necessary, but it won't be very long. All right, you may proceed with your cross examination.

DENNIS J. LAWTON

a witness called by the Defendant. Previously sworn.

Cross Examination

Q. (By Mr. Haas): Mr. Lawton, I believe you have testified that Martin Troutfelt had a life insurance policy with your [69] company which preceded this one, a 20 pay life policy which preceded this one? A. That is right.

Q. Do you know what the total amount, the total annual premium on that policy was, or can you ascertain it from the records that are in evidence before you?

A. No. There are only quarterly payments dated on there: that is the payments that were selected at the time of application.

Q. What were his quarterly payments on that policy? A. $66.60 every three months.

(Testimony of Dennis J. Lawton.)

Q. $66.60 every three months. And that is on the 20 pay life policy? A. That is correct.

Q. Now can you tell me what the quarterly premiums were on policy number 3223099, Plaintiff's Exhibit 1 in evidence here?

A. The annual premiums?

Q. The quarterly premiums, if you can tell us that.

The Court: Or could you compute it within a very near figure?

A. (By the Witness): Yes. They would be—it would be approximately 27 per cent, 26.5 of the annual premium.

Q. (By Mr. Haas): Well, can you tell us in dollars and cents what the quarterly premium was on that policy? By that policy, I mean the policy here in suit. [70]

A. No. I need a rate book.

Q. Can you tell us from your file here?

A. Oh, yes, yes. The quarterly payment would be $104.30.

Q. That is the quarterly premium on the policy in suit was some $40.00 more than the quarterly premium on the policy which preceded this policy in suit?

A. That's correct because of the difference in price.

Q. Now inviting your attention to this form, which is called "Application to the John Hancock Mutual Life Insurance Company of Boston for Supplementary Provisions for Family Income,"

(Testimony of Dennis J. Lawton.)

which is in evidence as Plaintiff's A, and which your Honor has also attached to the policy a photostatic copy thereon, as I understand it this form when completed was mailed by your office to your home office in Boston, is that right?

A. Correct.

Q. And upon receipt of that application, the company in Boston prepared Plaintiff's Exhibit 1 in evidence, this insurance policy, is that correct?

A. On this and together with the other forms they already had, the original application for conversion, this one.

Q. I understand. What I am getting at is Plaintiff's 1 in evidence, this insurance policy, was written in Boston, Massachusetts? A. Correct.

Q. You didn't write it? [71]

A. That is right.

Q. And nobody in your office wrote it?

A. No.

Q. And then in some way the insurance company delivered policy to the insured, is that right?

A. Yes, that's right.

Q. Do you know how?

A. No, I couldn't—it was delivered possibly by mail, but I——

Q. I am asking you if you know?

A. No, I can't recall.

Q. You don't know how it was delivered. Do you know where it was delivered?

A. In New Mexico.

Q. On what do you base that statement? You

(Testimony of Dennis J. Lawton.)

say you don't know how it was delivered. If you don't know how it was delivered, how do you know where?

A. Because we were required to forward a receipt for the payment of the premium which would be attached to the policy and delivered at the same time.

Q. Would you clarify that for me? I don't think I understand.

A. And the policy would not go into effect until the premium was paid, and it would not be delivered until the premium was paid. [72]

Q. You mailed some document from San Francisco to New Mexico, is that right?

A. The policy?

Q. No, some document. You said you mailed a receipt? A. Yes.

Q. To New Mexico? A. Yes.

Q. And why does that make you believe that this policy was delivered in New Mexico?

A. Because on a conversion it's the practice to send the receipt and the policy under cover of a letter.

Q. But you just told me that you didn't send the policy, that somebody in Boston sent the policy. A. To our office.

Q. Oh, the policy was sent then, this paper, Plaintiff's Exhibit 1, was sent to San Francisco?

A. Correct.

Q. To your office, and you sent it somewhere?

A. Correct.

(Testimony of Dennis J. Lawton.)

Q. Then you do know how it was delivered?

A. Well, I couldn't swear to it. But that is the practice of our office. When a policy is changed and its receipt from the home office, the premium is paid, the receipt is issued. And the policy and the receipt with a covering letter, the letter of transmittal, is sent to insured, if he [73] resides out of the City or out of town.

Q. By mail? A. Correct.

Q. Do you have the covering letter?

A. No, sir. I am not in the office any more. I worked on it at that time.

Q. Is there a covering letter somewhere in the files of John Hancock?

A. I don't know if it would be important enough to be retained for 14, 15 years.

Q. I understand your testimony to be then that the ordinary practice would be for this piece of paper, Plaintiff's Exhibit 1 in evidence, to be mailed from San Francisco to the residence of the insured? A. Correct.

Q. And that's your knowledge of the way this policy was delivered?

A. Yes. That was the general—that's the regular practice.

Q. I see. Again inviting your attention to the application for supplementary provisions for family income, as I understand your testimony, the typing on this form, to-wit, the name "Martin E. Troutfelt", the figure "15", the figure "10", and the

(Testimony of Dennis J. Lawton.)

figures "$44.30", were typed in your office in San Francisco, is that right?

A. It was typed at the home office or in our [74] office at the direction of the home office.

Q. That is, you don't know where it was typed, these figures?

A. Well, one of two places; at our home office or in our office at the direction of the home office.

Q. In any event it was typed by someone in the insurance company? A. Correct.

Q. And it was not typed by Mr. Troutfelt?

A. Correct.

Mr. Haas: I have no further questions. Thank you.

The Court: Any further questions, Mr.——

Q. (By Mr. Haas): It is a fact though, isn't it, Mr. Lawton, that the premiums for the various types of coverage in the policy sued upon in this case were broken down on the face of the policy?

A. Right.

Q. And it is the fact, isn't it, Mr. Lawton, that the original application for conversion of the old policy was defective in that the term of the family income rider was not stated on that application and the company so informed you?

A. That is correct. The company has to have the definite period of years because if the period is not correct they cannot attach—issue the policy with the rider applied for. So it has to be specified and no rider can extend the period of the policy.

Q. Now did you check with Mr. Elman, Presi-

(Testimony of Dennis J. Lawton.)

dent of John Hancock here in San Francisco, for records and correspondence relating to the delivery of this policy? A. Yes, I did.

Q. And is there such correspondence?

A. It cannot be located.

Mr. Haas: That is all, Mr. Lawton.

Redirect Examination

Q. (By Mr. Clausen): In what way, Mr. Lawton, would you be notified by the home office that the application for conversion of the 20 pay life policy was defective?

A. Through correspondence as per memorandum on the home office copy of the original application.

Q. You are pointing to the entry 6-23-39?

A. That's right.

Q. Date of letter "To 6/23/39"?

A. That is a letter to the district office.

Q. "From: 6/27/39"?

A. That is from the district office to the home office.

Q. The name of the correspondent "F-1"?

A. Yes.

The Court: I have that phone call and I will take a brief recess at this time.

(Recess.) [76]

The Court: Now, Mr. Haas, are you going to be very much longer?

Mr. Haas: About three minutes, your Honor.

The Court: All right, proceed.

(Testimony of Dennis J. Lawton.)

Recross Examination

Q. (By Mr. Haas): You have pointed, sir, to a pencilled notation 6-23-39, to, from 6-27-39, name of correspondent is F-1, regarding, and then it says Re FI? A. Yes.

Q. Is it your testimony that that was a letter from the home office to your office?

A. The original, the two, yes.

Q. That is? A. 6-23-39.

Q. A letter dated June 23rd, '39 was written from the home office to your office?

A. Right.

Q. And the subject of that letter was family income, is that right?

A. It was in connection with an error on the application for conversion. The term of the family income provision was not specified, which is required.

Q. How long has it been since you have seen that letter? A. Which letter? [77]

Q. The letter we are talking about, the letter dated June 23rd, 1939?

A. Well, I haven't seen it since July of 1939, but—and the following forms here tell me what it was about.

Q. Show me how they tell you what it was about.

A. This application for conversion doesn't specify family income terms.

Q. Then what you are saying is you are deducing all this from the forms here?

(Testimony of Dennis J. Lawton.)

A. No, from knowledge of the facts of processing so many typed transactions.

Q. All I am asking you is, sir, do you recall what the letter said? I am not asking you to deduce what you think the letter said. But do you recall what the letter said?

A. No, sir, I don't.

Q. Then you are just telling us that from looking at these forms you assume that that letter said something?

A. I know for a fact that this form — they couldn't issue a policy on this form because it does not specify a term.

Mr. Haas: Very well. I have no further questions. Thank you.

The Court: Any further questions?

Mr. Clausen: Just one. [78]

Further *Recross* Examination

Q. (By Mr. Clausen): These notations in those forms and the sequence refreshes your recollection about the general content of that letter, doesn't it?

A. Well, they have a record of all correspondence relating to a policy since it was issued.

Q. But I am looking——

A. The forms tell me that they had to be submitted.

Q. It refreshes your recollection, isn't that correct? A. That's right.

Mr. Clausen: That is all.

Mr. Haas: I won't pursue the matter.

The Court: It simply goes to its weight. Now is there any further evidence?

Mr. Clausen: Your Honor, the defense rests.

Mr. Haas: The plaintiff rests, your Honor.

The Court: Now then, what do you want to do about submission in this matter as to briefing the law questions?

Mr. Haas: Anything that suits your Honor is perfectly all right.

The Court: I presume that you gentlemen have your law pretty well assembled. How much time do you want?

Mr. Haas: Do you want me to start, your Honor?

The Court: Well, of course, actually I think [79] unless you want to waive opening and closing, that is up to you. You made the prima facie case, it's up to them now. If you want to reverse the order of briefing, it's satisfactory with me, but you have the privilege, Mr. Haas, of opening and closing.

Mr. Haas: I will certainly exercise it because that permits me to write twice as much.

The Court: I hope not. Then how much time do you want to open, Mr. Haas?

Mr. Haas: Five days will be quite sufficient.

The Court: What is your situation?

Mr. Clausen: I would prefer ten days to reply.

The Court: You want ten, ten and five then?

Mr. Haas: Ten, ten and five is perfectly agreeable.

The Court: All right. When will that put it down?

The Clerk: That puts it down, your Honor, for March 6th. The following Friday would be March 11.

The Court: Well, the 6th is a Sunday. All right, I will put the matter—in other words, where these days fall on a holiday, why, you can extend your time to one day. But I will put the matter down for March 11th for submission. I want all the briefs in by that time. Ten, ten and five will be the order and then the matter will come on for submission. It's not necessary for you to be here on submission. It will just come on the calendar and be submitted. I want to get this law question ironed out in my mind. I think I have the [80] facts fairly well straight. Let's see if we can't get this disposed of as quickly as possible. You gentlemen appear to have a good grasp of the case. See if you can't view it as briefly as possible. That is all I am interested in.

All right. That will be the order.

Mr. Haas: Thank you, your Honor.

Mr. Clausen: Thank you, your Honor. [81]

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Settlement of Findings

Friday, June 24, 1955

The Clerk: Cohen versus John Hancock Insurance Company, settlement of findings.

The Court: All right.

Gentlemen, would you step forward?

Now, I put these findings down for settlement because of some rather violent differences on findings, and one conclusion as it affects the judgment, that is, the manner in which this amount of money should be paid. I call counsel before me because I want to determine the issues and get the findings and judgment—the findings and conclusions signed and entered in the judgment, signed and entered.

Now, first of all, coming to the amount of money here and the manner in which it is to be paid. The plaintiff contends this is an anticipatory breach, and therefore the full amount comes due. I take it it's the defendant's position that the money should be paid in accordance with the provisions of the policy?

Is that correct?

Mr. Clausen: That is correct.

The Court: In other words, the payments that have not been paid should be paid in a lump sum. Then as to the future payments, they should be paid in accordance with the provisions of the policy. Is that correct?

Mr. Clausen: Yes, that is correct.

The Court: Now, Mr. Haas, I want to get this [2] anticipatory breach started. In other words, I don't want to make any more trouble than is necessary. I want to conclude this matter as rapidly as possible. If this comes within the anticipatory breach rule, I presume you would concede that the lump sum would be due and payable, is that correct?

Mr. Clausen: That is correct.

The Court: But you claim that this simply doesn't fit the anticipatory breach rule, is that correct?

Mr. Clausen: What about that, Mr. Haas?

Mr. Haas: Well, we, of course, think it does, your Honor. We have read counsel's case here, that Briggs case.

The Court: Yes?

Mr. Haas: And I have read it and run it down. I come up with a case in 23 Cal. (2d), the Caminetti case, which is a unanimous decision of the Supreme Court, some eight or nine years later, after the Briggs case——

The Court: I want to get that citation.

Mr. Haas: It's 23 Cal. (2d). It begins at page 94.

The Court: 23 Cal. (2d), 94.

Mr. Haas: That case, your Honor, is one in which——

The Court: It's 23 Cal., 94?

Mr. Haas: The case begins on 94.

The Court: At what page?

Mr. Haas: At page 104 the Court discusses——

The Court: Now, what is the title of the case?

Mr. Haas: Pardon me. Caminetti versus Pacific Mutual Life Insurance Company.

The Court: He was then the insurance commissioner?

Mr. Haas: Yes, your Honor. This involved an insolvent insurer.

The Court: All right.

Mr. Haas: Now, in the defendant's case of Brix

and others, which can be found from the Brix case, you have a situation in which the insurer's obligation to make monthly installment payments flows from accident-disability type policy in which the payee of the money is entitled to the installments if—but only if at some future time he is disabled and is losing time, and so forth. That, I think, is apparent from the Brix case itself. On page 104 of the Caminetti case the Court says:

> "In the instant case the old company is insolvent and being liquidated, it cannot perform under the non-cancellable policies it had issued. They have, in effect, been cancelled. The situation is thus analogous to a breach by anticipatory repudiation."

They are talking about life insurance, which is the kind of contract involved in this case. Anticipatory breach is recognized in California. Upon the repudiation, the promisee may immediately bring an action for future damages, citing cases.

Then skipping down to where they talk about [4] the Brix case, the case of Cobb versus Pacific Mutual, Brix versus Peoples Mutual and the Robinson case which I have in the memorandum, they

> "were concerned only with the question of recovery of the payments which might become due for continuance in the future of the existing disability as well as payments past due. There was not involved the issue of damages for total repudiation of the contract of insurance * * *"

and so forth.

Here we have a case in which, as counsel concedes, the payments are fixed and must be paid. It has nothing to do with the condition of the health of the plaintiff in this case.

The Court: Well, there is no question about that. The problem is whether that is an anticipatory breach. To be very frank with you I didn't give much attention to that in the memorandum. I followed your theory. I was more concerned with the question of whether or not they had a right under the policy to refuse to pay, and whether they were entitled to reformation of the policy. Of course, that was a mistake.

Mr. Haas: Of course, it's an admitted fact here that the defendant insurer has written the plaintiff and said, "We are not going to make any more payments."

The Court: I don't think there is any argument about that, is there?

Mr. Clausen: Of course not, your Honor. This situation is actually just the same as a health insurance repudiation, [5] because the particular beneficiary here concerned might die tomorrow. Of course, the family income payments to her would cease, but would go over to the contingent beneficiary. It's almost precisely the same. The reasons stated in these cases, *Briggs* and the *Cobe* case, apply just as much as in the health insurance case. You can't have an anticipatory breach under a unilateral contract.

The Court: Well, I will have to give attention to it. Do you have any other cases, Mr. Haas, on it?

Mr. Haas: No. That is the only one I wish to call to the Court's attention.

The Court: Fine. I have that.

Now then, I want to go back to the matter of the findings themselves.

Mr. Haas: On the matter of the findings, I wonder if I might just run through them quickly?

The Court: Of course. Would you proceed? We will start with the plaintiff's findings as I directed plaintiff to prepare them.

Mr. Haas: Very well, your Honor.

The Court: And then you can take the objections the defendant makes as to each one. I think some of the objections I found in the sense that I don't think they have changed the legal effect in any way. But I do think that if perhaps the facts were as suggested, I think there are a couple of [6] conflicting points in which he wants me to find on the basis of which I could not find——

Mr. Haas: I think so. As I understand it, there is no objection to the plaintiff's proposed Finding No. 1.

Is that right, Counsel?

Mr. Clausen: No, there is not.

Mr. Haas: Or No. 2, or 3, as written. But defendant wishes to add something at that point, isn't that right?

Mr. Clausen: Well, there is a separate paragraph.

The Court: Do you have any objection to the separate paragraph which is proposed here, Mr. Haas?

Mr. Haas: My only objection is this, your Honor: I haven't studied it carefully for his accuracies. But I will assume it's accurate. I think it's evidentiary.

This is an action not on Policy 3171136 in the amount of $5,000, but on the policy which was subsequently issued in conversion of this policy. All these facts may be true, but it seems to me that the purpose of findings is to find the ultimate facts which are in issue in this case.

The Court: I will agree with that.

Mr. Haas: If this is the case, as I think it is, counsel is fully protected by the record if he wants to make some argument from this evidence. But I don't think it's relevant in determining what the rights of the parties are under the contract in suit to have a finding that there were some other [7] contracts entered into by the parties prior to the contract in suit.

Frankly, I had considerable difficulty in knowing where to stop in these findings. I finally decided that the only way we could keep the thing within reasonable bounds was just to get to the ultimate issues as we saw them and find on them.

The Court: Well, how, Counsel? Why is this necessary to be added?

Mr. Clausen: I think it's an accurate statement of the evidence——

The Court: But is it not an evidentiary matter?

Mr. Clausen: It is evidentiary, your Honor, for the reason it's added—we deem the two policies to be interrelated, all one contract.

The Court: That may be, but I don't think——

Mr. Clausen: And a modification of the original contract.

The Court: I just think it adds to the verbiage and doesn't add to the ultimate facts. So I will not accept that suggestion.

Mr. Haas: Now, I think plaintiff's proposed 4 and 5 might be treated together, your Honor. As to each of those, the defendant wishes deleted to substitute Paragraphs II and III.

Now, the basic issue, of course, in this case is whether or not there was a contract between the plaintiff and the defendant, a life insurance [8] contract.

In Paragraphs III and IV of the plaintiff's complaint it is alleged:

"That as of February 24, 1939, Martin Troutfelt, as insured, and defendant as insurer, entered into a written contract of life insurance on the life of Martin Troutfelt."

The contract was represented and evidenced by defendant's policy No. 3223099, together with supplements. One of the supplements attached was a provision for family income, a true and correct copy of which is attached hereto as Exhibit 1 and made a part hereof.

Now, our proposed findings 4 and 5 found on the issues made by those allegations of the complaint—specifically, we propose the findings that the defendant as the insurer and Troutfelt entered into a contract of life insurance. The terms are

contained in a certain policy. The plaintiff was the beneficiary, and so forth.

Proposed Finding 5: As part of the contract there were several supplements, one of which is supplementary provision for family income. Then we set out what the terms of the provisions were in the supplementary provision for family income. These, it seems to me, your Honor, are the very substance of this lawsuit.

The Court: Well, I don't think they should be stricken. I agree with that. I mean, I think that [9] they set forth the substance. But I am concerned in this respect, with the fact that there is no place in the findings where it is found that a clerical mistake was made. I think the evidence establishes that, and the decision of the Court proceeded on that assumption.

Mr. Haas: Your Honor, I am aware of that.

The Court: In other words, I think you are entitled to a finding of that nature.

Mr. Haas: Very well, your Honor. We made no such finding for this reason: We, in our Paragraph VII—to get ahead a little bit—there is a finding that "Any mistake in writing"—this mistake——

The Court: Yes, I understand. You provide that any mistake that was made——

Mr. Haas: ——was not a mutual mistake; was a unilateral one.

The Court: That is true. I will go along with you on that. But I think there should be a provision——

Mr. Haas: We have no objection——

The Court (continuing): —— to conform with the allegation with Paragraph III, a suggestion that is made by the defendant in this matter.

Mr. Haas: I have no objection to a finding. We didn't find it because we believed it to be irrelevant. But if such a finding is required by the Court—— [10]

The Court: I think that is the assumption on which the decision proceeds, and——

Mr. Haas: I am sure that I can get together with counsel and propose one. Here, again, counsel proposed insertions. I think they are not limited to a mere finding, that this was a clerical mistake, but they are evidentiary after the original policy was issued.

The Court: I agree with that. That is why I said he is entitled, however, to a finding on the question of——

Mr. Haas: Very well, your Honor.

The Court: That there was a mistake made, a clerical mistake made by the scrivener of the company.

Mr. Haas: I am sure that counsel and I can work out such a finding. And that is as I deem a fact. and that is an assumption. Now, we will get together. then, and propose a proposed finding on that to be added.

The Court: Then that will satisfy that phase of it. If you can't agree, I will settle it for you. But I am sure you can.

Mr. Haas: Then I take it that 4 and 5 of the proposed findings are satisfactory to the Court, and

we will put in a finding that there was a mistake.

The Court: Yes. I have no quarrel with the finding as proposed. I just think that there should be an additional finding in that respect, because I [11] think the findings as you have proposed them presupposes that there was a mistake, and I think it should be said, and specifically.

Mr. Haas: Very well, your Honor.

Now, Plaintiff's Proposed Finding 6, the defendant wishes that deleted and another finding inserted here. I think that this finding is argumentative, and I think contrary to the decision of the Court. Once the Court determines that is the contract——

The Court: Yes?

Mr. Haas (continuing): ——between the parties, then it immediately follows that Troutfelt performed in accordance with the contract. What counsel wants us to do now is to say that the defendant charged the *insurer* a premium which was correct for the rider applied for, but was $10.00 per year less than the correct premium, and so forth.

The Court: That is evidentiary, again.

Mr. Haas: I think it's that, exactly.

The Court: I agree with you on that. You don't have to—I don't think that is necessary to the—I think that is a fact, but it's the presumption upon which the decision proceeds, but it is not an ultimate fact.

Mr. Haas: Yes, your Honor.

Then Paragraph VI of the proposed findings of the plaintiff is satisfactory, your Honor?

The Court: Yes. [12]

Mr. Haas: There is no objection to Paragraph VII, is there, Counsel?

The Court: No, there is none.

Mr. Clausen: No.

Mr. Haas: No objection to Paragraph VIII. However, at this point the defendant wishes to insert the following:

> "The application for policy No. 3223099 was made in New Mexico; premiums were made from there; policy was delivered there; contract was to be performed in New Mexico, and at all times the insured was a resident of New Mexico."

Now he says that is the applicable State law.

The Court: I think it is. I think he has a very fine motive behind it.

Mr. Haas: There is no doubt about that. Quite inconsistently, however, when we attempt to find a finding that the policy did contain an incontestability clause, he wants it deleted as being not material. Well, what I have to say is this: Perhaps we could discuss these two matters together, because they are interrelated.

We have proposed a finding that there was an incontestability clause, and counsel has proposed one attempting to, so-called, "fix" the State law. So far as we are concerned the incontestability clause appears in the contract, and whether we have a finding that there was one or not isn't [13] going to make any difference. That is just part of the contract.

We were thinking this way: that if counsel

should seek to appeal this case, it might be easier for the Appellate Court to just have the thing right before them in the form of a finding, rather than to have to go through that enormous document and locate the thing. However, as to defendant's proposed finding here, I don't think the evidence supports it.

The application was made in New Mexico. I think that is probably true. At least I think the application says on its face that it was mailed from New Mexico, or something. I am a little hazy as to the details. Premiums were paid from there. I don't think there is a shred of evidence as to where premiums were paid from. The policy was delivered there, as I recall the testimony of the Witness Lawson.

Mr. Clausen: I believe so, yes.

Mr. Haas: I think he said they mailed it to New Mexico, which would support that finding. The contract was to be performed in New Mexico. Of course, the contract is being performed right now. And as I understand the law, it's going to be performed where the beneficiary is. Now, they say the insured was a resident of New Mexico. I don't think there is any evidence as to whether the insured was a resident at any time.

The Court: Well, it raises a question. I don't [14] know the ultimate result will be changed, although it might be more arguable under New Mexico law, that he may be determined relieved of the unilateral mistake, *then* we could, under the California law. I gather that is the reason for this par-

ticular provision here. I gave consideration to that, and concluded that under either law, it wouldn't make any difference. But I may be in error on that. That is a matter which could be argued, if there is further appeal. I am inclined to—my recollection of the evidence is that the evidence is not clear enough for me to find that.

Mr. Haas: That is my recollection.

The Court: While there may be some evidence that would point to some of the statements there, I don't think I can find as positively as it was there said, "There is no question but what these people were in New Mexico and the policy was mailed to them there." I am sure of that. But as to the place of performance, and so on and so forth,——

Mr. Clausen: May I have a word, your Honor?

The Court: Yes, certainly you may.

Mr. Clausen: On the exhibit of ours with all those documents attached more than suffices for each of these statements, except the one about where the contract is to be performed. And that is an admitted fact, that beneficiary is a resident of New Mexico.

The Court: Well, as I say, I don't know [15] whether I could quarrel with that. I would think that the evidence might indicate that. But I wouldn't say that I would be disposed to find it. And is it necessary that that be found? That is the point. In other words, you are right on your right whether you have a finding on it or whether you have a finding—there is no finding against it.

Mr. Clausen: I have done some research on this problem of applicable law. I find it very confused. And so sometimes they say it depends upon where the premiums are paid from, sometimes where the beneficiary is, or where the contract was made. In this case we have, we purposely put into evidence —my recollection is that we did have evidence on each of these points. We had it in mind, so that we would satisfy each one of those particular tests.

The Court: Yes. I say that I consider it a question of applicable law, and arrived at the conclusion, as I did, so stated in the opinion. But I arrived at the conclusion that there is no fundamental difference between the law of California and the law of New Mexico.

As I say, however, that may be a question upon which minds might differ. I don't want to foreclose you from making your point if you feel it should be made.

However, I am doubtful that it should be found upon—the evidence is as it is. I don't think it's necessary for me to find that. I simply concluded, after checking your New Mexico [16] situation, that the law wouldn't be different either place, and decided the case upon that basis. So I don't propose to find in accordance with the amendment. I don't say that it is correct, but I just don't think I have to find on that. I will take the Finding 8 as it is proposed, because there is no objection to that. All you want is an addition——

Mr. Haas: Plaintiff's Proposed 8 the defendant wishes deleted. That is the finding in which we

propose that in the exercise of ordinary care, reasonable diligence could have discovered its alleged mistake in 1939.

I rely for that finding, your Honor, on the opinion, page 3, line 25:

> "There is no proof of facts tending to excuse defendant's failure to discover its mistake within three years after it occurred."

Now, the burden of proving and pleading discovery is on the defendant. So when there is no proof, there is only one possible finding, and that is when they could have discovered it.

The Court: Well, I didn't know whether I am entitled to go back to that 1939, but I did go back past the statutory period in this case. I concluded that at least there was a period of time—now, I forget the precise date of plaintiff—1945—at which there should have been a discovery, and which carries them back. Now, I didn't stop to analyze the [17] facts any further once I got past the statutory period. I still believe that this is a type of mistake that should have been discovered by the defendant. This isn't a mistake that can be charged to the plaintiff in this case, or to the plaintiff deceased. Therefore, my only problem concerned with me is the date that is fixed here.

Mr. Haas: Well, I should point out that perhaps we could discuss 9 and 12 together, your Honor, because our proposed finding reads:

> "In the exercise of reasonable care and reasonable diligence, defendant could have discovered his mistake in 1945."

The defendant makes no objection to that finding.

The Court: I agree. I mean, I just didn't—to say very frankly, I didn't go past 1945 in my own thinking in the matter.

Mr. Haas: Perhaps counsel would be satisfied if we just took 12 and put in 1939, or at the latest in 1945.

Mr. Clausen: No. Why even have anything concerning 1939? To begin with, the finding is not correct. There is evidence in the record which would go to the issue of whether they exercised ordinary care, reasonable diligence, prior to 1945.

Mr. Haas: Yes. But the opinion says:

> "There is no proof of facts tending to excuse defendant's failure to discover its mistake within three years after it occurred." [18]

The Court: That is true.

Mr. Haas: That means that you signed an instrument, and there is no proof that you didn't know—there is no proof that you didn't read it, and that sort of thing.

The Court: I agree with you, Mr. Haas, for my recollection of the evidence is there is no reason why they shouldn't have done it earlier. But I came to this '45 date, and I concluded that there was no excuse for not discovering it then, whatsoever. I mean, it's just a plain mistake. And in the mistake, the mistake of the company, it's not the mistake of the insured. The insured had the right to rely upon what he thought was an accurate thing, and the payment of money involved was so small that he couldn't be put on notice as to what

different premiums would be paid. There is no notice to him, and he had—he wasn't right assuming he had a policy with certain provisions in it.

Now, my philosophy is that I find in accordance with the theory of the case. I do not want to make findings which are unfair or unreasonable from the facts. But I think that I should find fully on the theory of the case. And therefore, as it is my present thinking, while I didn't go back past 1945, I think that the theory of the case would indicate that that is a finding that should be made. It isn't as clear-cut as the 1945 one. [19]

I would be inclined to leave the findings the way they are, unless there is some other reason that you want to point out to me why that should be deleted as to Paragraph IX.

Mr. Clausen: Well, the reason only is that I don't believe the finding is supported by the evidence. And I set forth the evidence in my objections to the finding.

The Court: Yes, I am aware of that.

Mr. Haas: There is no objection, your Honor, to Finding 10. Through our typographical error, there is no proposed finding of 11. It skips from 10 to 12. There is no objection to Plaintiff's Proposed 12.

Now we get to Plaintiff's Proposed 13, which the defendant wishes to delete.

13 is:

> "It is not true that defendant discovered its alleged mistake in 1954, but on the contrary, it

discovered its alleged mistake in 1939, or at the latest on July 26, 1945."

As your Honor is aware, the defendant has a counterclaim on file herein, in which it is alleged, as it must be, that they discovered their mistake in 1954.

The Court: Yes.

Mr. Haas: The Court's opinion holds that there is—:

"Therefore, it is the conclusion of this Court that by the exercise of ordinary care, the [20] defendant could have discovered its mistake in 1945."

As a consequence of which it immediately follows the burden of proof being on the defendant, that if they could have discovered it, they would discover it.

The Court: I would say that is true.

Mr. Haas: Discovery being a word apart.

The Court: I will accept Finding 13.

Mr. Haas: There is no objection to 14, your Honor.

Now, when we get to 15——

The Court: Yes, that is the one that goes——

Mr. Haas: That goes to the anticipatory breach thing. As I understand it, there is no objection by defendant to the first sentence of the finding, Proposed Finding 15. They simply wish deleted the last sentence thereon. That raises the anticipatory breach question that we have already discussed with your Honor.

Now, 16 the defendant wishes deleted as imma-

terial. And as our only reason in inserting it, your Honor, was so that should the defendant appeal we would, of course, wish to raise this question. And I think the facts that we asked the Court to find, i.e., that it was necessary for plaintiff to employ an attorney, and so forth, are obviously true or we wouldn't be standing here today.

I am just trying to avoid a situation which, if the defendant should appeal, and the Court of Appeals should conclude [21] that we were entitled to some remuneration under this provision of the policy, there would be a finding, and alleviate the necessity of having to make the necessary findings.

It's an issue in the case, and I think it follows the opinion. And the only question is whether or not it is in the Court's view immaterial.

The Court: I don't know the materiality of it, myself, but I wondered why it was necessary to find on that.

Mr. Haas: Certainly it is material. I would agree with the defendant to set forth what the policy states, other than for mere clarity and to make the thing easy to handle. I think that if the point is going to be made on appeal we would have to have a finding that it was necessary for the plaintiff to employ an attorney to commence and handle the action, although perhaps even that would appear from the records of the Court——

The Court: I decide that point in your favor?

Mr. Haas: That is right, your Honor.

The Court: I just don't seem to think——

Mr. Clausen: This is completely immaterial. The Appellate Court, of course, is going to notice that the plaintiff is represented by counsel. If they want to raise this point on appeal they are welcome to do so.

The Court: Well, I see no reason for finding it. I think you have your right to raise it, anyway, if you want to. I don't see the necessity for finding 16, and I don't think [22] there is anything wrong with the finding.

Mr. Haas: 17, your Honor, is of the same type, that is, we have set forth the uncontestability clause, so that it can be conveniently available in the event the defendant should appeal here.

The Court: I don't think it has to be found. It's in the policy. You can argue it.

Mr. Haas: Yes, your Honor.

The Court: It may go out, too.

Mr. Haas: There is no objection to Finding 18.

The Court: Yes, that's right.

Mr. Haas: And before we leave the subject of these attorney's fees, so-called, I wonder if I could have another word. The fact that we are out here again today indicates to me that this thing may be going on for some time. We have heretofore requested an allowance of attorney's fees. I think our characterization of the award has been most inept. Of course, the Court has quite naturally viewed it from a standpoint of attorney's fees because that is the presentation made by the plaintiff.

I think on analysis, what the plaintiff is seeking here is merely damages for breach of a warranty.

The Court: I see. And as part of the damage, you contend that there should be attorney's fees awarded, or there should be an amount put in? [23]

Mr. Haas: Let me put it this way, your Honor: If this is a warranty, as we believe it is, it's perfectly plain. Then the measure of damages for that breach of warranty is measured by the attorney's fee.

We have a comparable situation, for example, in a warranty deed. The grantor warrants he sold possessions, this, that and the other thing, to defend the title. Now, if a *lost* claim is asserted, and the grantor or warrantor will not defend as the deed says he will, the grantee may defend and recover against his grantor for breach of warranty damages which are measured by the reasonable attorney's fee. That is part of it. It's quite true, as your Honor points out in the memorandum opinion, that there are no expressed promises in this policy to pay attorney's fees, as you find no promissory note if action is brought.

The Court: The contract.

Mr. Haas: That's right. But there are no expressed promises.

The Court: In other words, it's a contractual problem. It has to be provided in the contract, and there is no provision in the contract for it. Therefore, you are not entitled to it under the general theory that each party must bear his own attorney's fees in litigation, unless there is some provision otherwise.

Mr. Haas: Perhaps I am not putting the point over, your Honor. [24]

The Court: I recognize your point now. I hadn't considered it before. It's a novel point, and it's, in general, just a way of getting in the back door to attorney's fee, Mr. Haas. But I don't see that it will work, as Judge ——— said in the deciding opinion a few days ago.

Mr. Haas: Of course, that is what judges are for, to decide. I just wanted to make certain that we had got over to the Court what I think is the only possible basis of recovery, which is damages for breach of warranty. Now,——

The Court: I think you are expanding on the original theory, Mr. Haas. This is an attempt to recoup which was decided against you. I see your point, and frankly, if I were a lawmaker, I would have a provision and vote for you. But this isn't the legislative body. This is a judicial body, and I have to decide the law as it is. And I just don't think you are entitled to get attorney's fee in this situation, as much as I would like to see you have it as a matter of policy.

Mr. Haas: Well, I have done the service to the client by presenting the proposition, your Honor.

The Court: And I can't allow my own philosophical thinking to interfere with my interpretation of the law.

Mr. Haas: Now, as to the conclusions, your Honor, the first conclusion, the defendant has no objection, and wishes to have added the language:

"Defendant's defense of mistake is barred

by the provision of Section 3384 of the California Code of Civil Procedure."

I don't think this is a conclusion of law. I think that is a reason. I think it's adequately covered in the memorandum opinion.

The Court: Let's see. I don't follow you here. This isn't in Paragraph I in any way.

Mr. Haas: Conclusions, Paragraph I.

The Court: Yes. They want to add to the one sentence that the Court has jurisdiction over it. They want to add something to it.

Mr. Haas: That's right, your Honor. They want to add that:

"Defendant's defense of mistake is barred by the provisions of 3384."

The Court: Why is that necessary?

Mr. Haas: It's not necessary, your Honor. I have some difficulty in reading the opinion to determine whether or not you were applying the statute of limitations only to the counterclaim, or both to the counterclaim and answer, because these other findings, of course, all relate to the statute of limitations.

The Court: That's right. I think the findings are clear enough. I am not going to do anything further on that. [26]

Mr. Haas: Now as to Conclusion No. 2. I think what defendant is attempting to do here is reach the anticipatory breach question again. That is, defendant wishes to delete, on line 6, the words:

"* * * in the sum of $8,000,"

without substituting anything therefor. So that the second conclusion would read:

> "Plaintiff is entitled to judgment against defendant together with interest at seven per cent per annum until the date of entry of judgment on these sums of money together with her costs of suit."

The Court: I think that is correct, Counsel. You are trying to reach the anticipatory breach question.

Mr. Clausen: We are trying to——

Mr. Haas: May I point out to the Court that time keeps running here, and there are additional $50.00 payments which are now in default which we would like to add here.

The Court: You can.

Mr. Haas: Paragraph III of the proposed——

The Court: Yes. But I still have to decide your anticipatory breach question finally.

Mr. Haas: Yes, your Honor.

The Court: Now, if I decide that adversely to you, which I want to be clear on it—as I say, I didn't recognize it, but I didn't give any complete detailed attention. I accepted [27] your theory, Mr. Haas, really. And this is the point that counsel raises, is the point that has to be very carefully considered. My thought was that "The tail went with the hide," if I may use an old cattleman's expression. And since you had already been awarded the hide, I thought that you could just go along and clean the matter up and get the business done. But insurance companies seem to have

some objection to that. Therefore maybe I had better re-examine my position on it.

Mr. Haas: Well, of course, your Honor, your decision on that question will cut through a lot of these problems here.

The Court: Yes.

Mr. Haas: Except there is this one problem which I think will be outstanding: As I understand it—and you will correct me, please, Counsel, if I misstate your position—it's the defendant's position that there should be no declarations of rights at all in this case, and that the only judgment that should be entered is one for payments which are now due.

The Court: Yes.

Mr. Haas: And the direction to pay in accordance with the terms of the policy.

The Court: Of the policy as written.

Mr. Haas: Well, you see, to our proposed judgment, which contains, first, a paragraph declaring the rights of the parties, and second, the money judgment, the defendant proposes objections, and they want to delete the entire first paragraph [28] of the judgment, which is the declaration part of the judgment. Seriously, in counsel's proposed conclusions of law, he, himself proposes a conclusion that the rights and duties of the parties are so-and-so. I am just trying to get straight what the defendant's position is, so that when the Court rules on that anticipatory breach question we will know what kind of a judgment to prepare.

The Court: What is your position?

Mr. Clausen: That is correct, your Honor. As you just stated, that if there is to be a declaration of rights, it is the right of the defendant to pay in accordance with the terms of the policy as written, and the rest of this declaration is unnecessary. I believe that plaintiff's declaration has such words in the anticipatory breach.

The Court: Well, you conclude that if I find there is an anticipatory breach, or conclude as a matter of law there is an anticipatory breach, that then the whole amount is due and payable with interest as indicated, isn't that correct?

Mr. Clausen: They can, your Honor.

The Court: And once that decision is made, then that answers the thing. And if it isn't, then do you still say there may be a problem, Mr. Haas?

Mr. Haas: No. Counsel has cleared it up for me now. As I understand counsel's position, if there is no anticipatory breach, the defendant still wishes the judgment, which does [29] have a declaration in it, along the lines proposed by counsel, himself.

I suggest, your Honor, that on that point now, when I speak of anticipatory, what we are really talking about is a total breach of the contract.

The Court: Yes.

Mr. Haas: And this is an installment contract. There is a lot of law in it. I suggest that we write a letter to your Honor setting forth the authorities.

The Court: I wish you would exchange mutual letters, which you will exchange, setting forth your views on this thing. I think it ought to be done so

that I have it and have the benefit of it, because I am going to have to research that point.

Frankly, I got down to my deciding how I would interpret the policy and the claim, and the question for relief for reformation, and then I came to the question, well, "What judgment is there to award here?" I recognize that there was this argument. But as I say, I didn't know whether it would be a real argument among the parties, and, therefore, decide it on plaintiff's theory. And I find now that there is a real argument that I have to settle, and I didn't adequately settle it in my memorandum.

So how much time do you want to write your letters? Four or five days? [30]

Mr. Haas: You would want to begin, wouldn't you?

The Court: Is five days enough?

Mr. Haas: Five days is plenty.

The Court: Fine, then. I will just take these findings under advisement. Once we conclude this point, then you can propose the revised findings and the revised judgment, if necessary.

Mr. Haas: Very well. Thank you. [31]

[Endorsed]: Filed July 5, 1957.

[Endorsed]: No. 15619. United States Court of Appeals for the Ninth Circuit. John Hancock Mutual Life Insurance Company, a corporation, Appellant, vs. Mary Troutfelt Cohen, Appellee, and Mary Troutfelt Cohen, Appellant, vs. John Hancock Mutual Life Insurance Company, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: July 9, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 15619

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

MARY TROUTFELT COHEN,
Appellee and Cross-Appellant.

DESIGNATION OF RECORD AND DESIGNATION OF POINTS TO BE RELIED UPON

Appellant John Hancock Mutual Life Insurance Company designates for inclusion in the record on

appeal to the United States Court of Appeals for the Ninth Circuit taken by notice of appeal filed on March 27, 1957, the entire record of all proceedings and evidence in this action.

Appellant above named states that the points on which it intends to rely on the appeals in this action are as follows:

1. The trial court erred in finding that by the terms of the contract between this appellant and the insured the said insured was to pay premiums for 15 years from the effective date thereof.

2. The trial court erred in finding that by the terms of said contract this appellant agreed to make monthly payments of $50.00 per month to plaintiff for a period extending to and including February 1, 1959.

3. The trial court erred in finding that the said insured did not know nor suspect, nor reasonably could or should have known or suspected any mistake in writing the premium payment term in the supplementary provision for family income as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, and in finding that such a mistake was the unilateral mistake of defendant alone.

4. The trial court erred in finding that in the exercise of ordinary care or reasonable diligence, this appellant could have discovered its alleged mistake in 1939, or in 1945.

5. The trial court erred in finding that this appel-

lant discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

6. The trial court erred in finding and concluding that this appellant committed an anticipatory breach of the said contract on or about May 13, 1954.

7. The trial court erred in awarding judgment to respondent in the sum of $8,000.00, together with interest at 7% per annum until the date of entry of judgment on installments of $50.00 dating from March 1, 1954.

8. The trial court did not err in failing to award to respondent damages on account of this appellant's alleged breach of the following alleged warranty:

> "It is not necessary to employ any firm or person to collect the proceeds of this policy."

Dated: July 8, 1957.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, Jr.,
KEESLING & KEESLING,
WILLIAM H. KEESLING,

/s/ By HENRY C. CLAUSEN,
Attorneys for Appellant and Cross-Appellee.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 9, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT ON WHICH PLAINTIFF AND CROSS-APPELLANT WILL RELY

Pursuant to Rule 17(b) of the rules of this Court, plaintiff and cross-appellant Mary Troutfelt Cohen states that the point on which she intends to rely upon her cross-appeal is that the trial court erred in failing to award to her any damages on account of breach, by defendant-appellant John Hancock Mutual Life Insurance Company, of its written warranty that:

> "It is not necessary to employ any firm or person to collect the proceeds of this policy."

/s/ MOSES LASKY,
/s/ RICHARD HAAS,
BROBECK, PHLEGER &
HARRISON,

Attorneys for plaintiff-cross-appellant Mary Troutfelt Cohen.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 16, 1957. Paul P. O'Brien, Clerk.